TO AMEND THE CODE OF THE DISTRICT OF COLUMBIA

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-FOURTH CONGRESS

FIRST SESSION

ON

H. R. 14974

Serial 47

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TO AMEND THE CODE OF THE DISTRICT OF COLUMBIA.

SERIAL 47.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Friday, May 5, 1916.

The committee this day met, Hon. Edwin Y. Webb (chairman) presiding.

The CHAIRMAN. The committee has been called in session this morning to consider a bill (H. R. 14974) to amend an act entitled "An act to establish a code of law for the District of Columbia, approved March third, nineteen hundred and one," and the acts amendatory thereof and supplementary thereto.

We have present with us this morning Mr. Chief Justice Covington, of the Supreme Court of the District of Columbia, and a committee representing the Bar Association of the District of Columbia. Without objection, Mr. Chief Justice Covington will be heard first, and then we will hear the members of the committee of the bar association in the order in which their appearance may be suggested by the chief justice.

STATEMENTS OF HON. J. HARRY COVINGTON, CHIEF JUSTICE OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, AND MESSRS. A. A. HOEHLING, JR., J. S. EASBY-SMITH, J. S. FLANNERY, LEON TOBRINER, AND GEORGE E. SULLIVAN, REPRESENTING THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA.

Judge COVINGTON. Mr. Chairman, I have come here this morning at the request of the committee of the Bar Association of the District of Columbia in reference to the bill which is pending before you to revise the code of laws of the District of Columbia.

I shall make only a brief statement respecting the circumstances that brought about this proposed legislation, and, after that, leave to the members of the committee of the District Bar Association the duty of an explanation of the effect of the proposed changes.

It is quite proper to say to you gentlemen of the committee—and I am sure I am stating the facts correctly when I do so—that at the time the original code of the District of Columbia was passed it was the first effort to have a codification of the laws in the District. There had been the old common law—as it was in force in Maryland—supplemented by a more or less inharmonious series of statutes until, in 1901, there was drafted for the District a code of laws by a committee of prominent lawyers. That code, however, was not intended to be a complete code of substantive law, but primarily a codification of procedure, with certain modifications of the common law. The act passed Congress in the closing hours of the session ending March 3, 1901. It passed under such circumstances of pressure for time that there were, naturally, in it many matters concerning which time has demonstrated the necessity for changing.

From time to time those necessary changes have been so forcibly brought to the attention of the members of the bar and have been recognized as so increasingly urgent that now there has been a real effort made by the bar and by the courts to bring the procedure in the courts of the District and to bring certain matters pertaining to the substantive law in the District abreast of the times.

This committee here to-day was appointed by the court from the body of the Bar Association of the District of Columbia early last fall, so that the work is not a hasty work as was presented in the preceding bill by any means. The committee was selected after consultation by the court with many of the District lawyers and after consultation among the lawyers themselves and suggestions made to the court, so that there might be a really representative group of active practitioners charged with the burden of the preparation of this bill which is now pending before you.

This committee met, after abundant notice to the members of the bar of the District of Columbia, to prepare the changes in the code which had been suggested as the result of experience in the actual conduct ex parte and litigated cases covering a period of 14 years since the present code was adopted.

These amendments were first submitted to the District Supreme Court, and the court itself, sitting in general term, with the six justices present, gave a great deal of time and thought to them. They had each particular amendment submitted to them and they heard the members of the committee of the bar association in reference to the reasons for the proposed changes. The justices of the court considered the amendments, with the committee, and considered the amendments alone, without the committee, and the members of the court made certain changes in the committee draft that they believed desirable in the interest of a thoroughly sound, progressive and impartial administration of law in the District of Columbia. I can say to you, gentlemen of the committee, that the proposed changes are, in the judgment of the court, all highly desirable. They raise no controverted questions; they do not enter the domain of doubt in the law, but they are all changes, which, when you hear the explanation of them, I think will appear to you obviously as necessary to bring

the law into harmony with the best practice of the present day in other jurisdictions.

With the statement that the Supreme Court of the District of Columbia approves each of the proposed changes, I desire to make the further statement that notwithstanding the length of time that has been given to their preparation, and the publicity that has been given to them, there has been absolutely no substantial criticism of them. I do not pretend to say that there may not have been, from time to time, some furtive criticism of some one and another of the sections. I do mean, however, to say that with the general knowledge of the members of the bar in the District of Columbia that these proposed amendments were to be submitted to Congress for adoption in the form of legislation, and with the publicity that has been given to the matter in advance, there has not come to the attention of the court a substantial change in respect of any of them, save in two or three particulars, and those particular changes were so obviously impracticable changes that the court could not bring itself to believe that they ought to be recommended.

The committee of the District Bar Association, composed of Mr. Hoeling as chairman, Mr. Tobriner, Mr. Easby-Smith, Mr. Flannery, and Mr. Sullivan, is a committee, all the members of which have had large experience in the courts of the district, and I know it will be their pleasure to take up the bill with your committee and explain the effect of each of the proposed changes, and just what result in law each is intended to produce.

Also, I may say, there are two other bills which are before your committee which ought to be considered in connection with this bill in reference to proposed changes in the code. One of those is a bill providing for the revision of the procedure in the municipal court of the district which has charge of the litigation of minor civil cases. Then there is also a bill in respect to a proposed increase in the number of justices of the District Supreme Court, and when you come to that bill I shall ask the privilege of saying a few words in reference to it.

The CHAIRMAN. You do not care to be heard to-day on the other two bills you referred to?

Judge COVINGTON. Not unless we get through with this bill in time for you to take up the other two bills.

Mr. GARD. Is the matter in reference to the procedure in the municipal court contained in this bill?

Judge COVINGTON. No; that is in a separate bill.

Mr. WILLIAMS. As I understand from your remarks, both the bench and the bar of the Supreme Court of the District of Columbia are agreed on these proposed changes, as set forth in the bill which is now before the committee.

Mr. COVINGTON. Both the members of the bar of the Supreme Court of the District and the bench are entirely agreed upon those changes, in so far as you can get the opinions of a bar of 1,000 members in a city. With that statement I should say that both the bench and the bar have agreed upon these changes.

I would like again to say that this committee was appointed by the court after considerable thought, and after discussion with the members of the bar of the District, and the then president of the

Bar Association of the District of Columbia, in reference to the personnel of the committee. It was selected from among the most representative members of the bar.

I would like also to repeat that the court has no knowledge in regard to any substantial objection to these proposed changes. I understand that the committee has no information of any substantial objections, other than a few hazy suggestions from one or two members of the bar. No objection in concrete form has been submitted to the committee at all. There have simply been a few chance statements made that something else might have been done, but nothing in the way of a tangible and concrete objection has been presented.

The CHAIRMAN. Mr. Chief Justice, the committee would like to have a representative of the committee of the bar association explain to us briefly and clearly each change made, according to the parallel columns in the committee print of the bill, and the reasons for the proposed change. I suppose it has been arranged that some member or members of the bar association committee will do that, and we would like to have that for the record.

Judge COVINGTON. Mr. Chairman, Mr. Hoehling, is the chairman of the bar association committee, and I presume, it would be agreeable to your committee for me to leave to him the disposition of that matter.

The CHAIRMAN. Certainly.

Judge COVINGTON. The various members of the bar association committee have had in particular charge certain portions of the work in connection with the preparation of this bill, and if your committee will now look to Mr. Hoehling as the chairman of the bar association committee, he will indicate to you which members of the bar association committee will explain the particular parts of the bill.

Mr. HOEHLING. Mr. Chairman and gentlemen of the committee, it is perhaps proper that I should supplement the statement made by the chief justice in respect of the approval by the members of the bar generally of the suggested amendments. Of course, in working under the code, it was discovered by the bar, at an early date, that there were certain defects in its operation, and it has long since been desired that those defects be corrected. The bar association, in aid of the work of the committee appointed by the court, has itself appointed the same committee, so that we are a committee representing not only the court in respect of these matters, but also a like committee appointed by the bar association.

I may say that so far as I am personally advised, there is no objection to any single one of the suggested changes in the code. There have been suggestions in respect to the changing of some features of the substantive law, but we believed that these matters were more important and that some of the other changes proposed in the substantive law might form the subject of a separate, independent bill. So far as this bill is concerned, I know of no objection to it.

In working on the suggested changes, different members of the bar association committee have more particularly been assigned to work on different parts of the bill. I think on some of them we can get along very rapidly, because the bill, in its present form, is in

parallel columns, and I think that arrangement will readily show to you the changes that have been suggested.

So, if there is no objection, I will run along with a few of them, beginning with the first section, which is section 20, to be found on page 2 of the committee print of the bill.

The CHAIRMAN. That is in reference to forcible entry and detainer, section 20, page 2, of the committee print?

Mr. HOEHLING. Yes. That was a limitation that should not have been in the original code, and in its operation this situation developed. The landlord holding the property, perhaps would be held for it, and yet, under existing law the complaint had to be verified by the landlord. We have met that by changing the language in the existing law, in line 17, "Any justice of the peace, on complaint under oath by the person aggrieved by said unlawful detention," making that read in this way, beginning on line 16 of the section as proposed: "The municipal court, on complaint under oath, verified by the person aggrieved by said unlawful detention or by his agent or attorney, having notice of the facts," etc. That is a much-needed change and, I think, a self-evident one. That is practically the only change in the first section.

Mr. GARD. I notice there is a change in reference to the justice of the peace and the municipal court, and that in the proposed section you have omitted any reference to a justice of the peace, but simply refer to the municipal court.

Mr. HOEHLING. That is because we no longer have justices of the peace. We now have the municipal court in place of the justices of the peace.

Mr. GARD. Would it not be necessary to amend the law in reference to the municipal court in a similar manner?

Mr. HOEHLING. That is taken care of in the legislation providing for the establishment of the municipal court, which conferred jurisdiction in that court in these cases, but this section was not amended by the municipal court act.

Mr. GARD. If you have no justices of the peace, then this is mere surplusage, at best.

The CHAIRMAN. The next change seems to be in section 35. Will you please explain that?

Mr. HOEHLING. In reference to section 35, it is proposed to strike out this language, beginning at line 19 in the existing law: "An appeal may be taken from the judgment as in other cases, provided the same is prayed within four days after the entry of the judgment and an appeal bond is given within six days, exclusive of Sundays and legal holidays, thereafter." It is proposed to strike out all the language after the word "other cases." That change was made in reference to the time for taking an appeal and for protecting it, so that it would conform to the provisions for other appeals from the municipal court.

The CHAIRMAN. What is the difference between the time as stated in section 35 of the present law and the time provided in the general law in reference to other cases?

Mr. HOEHLING. In section 35 it was made to read "four days," whereas in other municipal court cases it is six days. It gives a little longer time.

Mr. GARD. The time is six days in other cases?

Mr. HOEHLING. Yes. We make this conform to the provisions for the ordinary cases.

The CHAIRMAN. The next proposed change is in section 65. Will you please explain that?

Mr. HOEHLING. Section 65 is a very important section. The important change in that section is the provision that the supreme court may establish written rules regulating pleading, practice, and procedure, "and by said rules make such modifications in the form of pleading and methods of practice and procedure prescribed by existing law as may be deemed necessary or desirable to render more simple, effective, inexpensive, and expeditious the remedy in all suits, actions, and proceedings, provided that said rules be posted or published not less than 30 days prior to the date when they are to become effective."

That particular section was worked on by Mr. Flannery, and I will be glad to have him explain it to the committee.

The CHAIRMAN. What court does that refer to?

Mr. HOEHLING. That refers to the Supreme Court of the District of Columbia and not to the Court of Appeals.

Mr. FLANNERY. Mr. Chairman, the object of that particular provision was to cure some defects in our code and in our antiquated practice, growing out of the fact that in many instances we still use the old forms of procedure prevailing at common law. We had the choice of two methods of making our remedy more expeditious and more inexpensive, and in every way more beneficial to the courts, to the bar, and to the people. One way was to adopt a code of practice as they have in New Jersey; the other a system of making changes in pleadings, practice and procedure, by rules of court, as they have in England and in some of the States.

After we had adopted this suggested change, with the approval of the court, I found that this matter had been under discussion by the American Bar Association and by the Ohio State Bar Association at its annual meeting in 1915, where Prof. Roscoe Pound, of the Harvard University Law School, who had made a very careful study of the subject, delivered an address. In his remarks to the members of the Ohio Bar Association he pointed out that their proposed amendments by which they wished, by rules of court, to regulate the matters of pleading, practice, and procedure in the various courts, were not only constitutional and in keeping with the present English system, but that it had been the system of the Supreme Court of the United States from the earliest day, in many important branches, such as bankruptcy, admiralty, and equity, and he saw no reason under the decisions why it should not be made to embrace actions at law as well as suits in equity.

All this proposed amendment does is to give the courts, whenever the bar, or whenever the community sugests that an antiquated pleading be abolished, or some antiquated practice be changed and improved, an opportunity to consider the matter, and adopt a rule of court which will take care of that situation.

The preparation of a code of practice and procedure would require years of work, and after its adoption you would have a situation such as that which exists in New York State to-day, where for 30 years they have been construing their code of practice and procedure.

Such a code is inelastic. It is hard to modify. It is hard to prepare in the beginning, and difficult to change when found to be unworkable in practice. But rules of court, where the court is in close touch with the bar, as here, can be readily changed to meet the exigencies of practice.

Mr. GARD. Is there any State in the Union which has adopted this plan proposed here?

Mr. FLANNERY. Prof. Pound, in reviewing that subject, told the Ohio Bar Association on July 7, 1915:

> This is a subject, however, on which really one ought to have something to say, because it is, I suppose, one of the live questions in American law at the present time. It is one that has been very carefully considered by the American Bar Association ever since 1907, when it was first discussed. It has been discussed extensively by the committee which drew the new practice act in New Jersey. It was discussed critically before the Colorado Bar Association before the adoption of the statute now in force in that State to the same effect. It has been carefully discussed at three successive sessions of Congress before the Judiciary Committees in the Senate and House. It has been the subject of an elaborate report by the new code commission in New York, and generally has received a great deal of attention.

Mr. GARD. Ohio has a practice code.

Mr. FLANNERY. Ohio has a practice code, and was endeavoring to modify its practice code. They had the matter under consideration at the annual meeting of the Ohio State Bar Association on July 7, 1915, and at that meeting this resolution was adopted:

> That a special committee be appointed to urge before the next legislature the importance of providing by law that the Chief Justice of the Supreme Court and such other judges of the several courts of the State and other persons, to be designated by the chief justice, as may be prescribed by law, be empowered to make rules relating to matters of pleading, practice, and procedure in the seceral courts of the State, such rules to supersede the provisions of the code of civil procedure upon kindred matters, and that the chief justice of the Supreme Court of Ohio be made the real executive head of the judicial department of the State.

That was a matter which was being considered by the Ohio State Bar Association in 1915, and it is the very matter we have under consideration here at the present time.

Mr. WILLIAMS. You have now the rules of common-law pleading here?

Mr. FLANNERY. We have the common-law rules of pleading, practically in all their purity.

Mr. WILLIAMS. And this is a reform of procedure?

Mr. FLANNERY. It is really a procedural reform. We have all realized that a great many reforms should be made; that a great many of our forms of pleading, as well as our methods of practice, are obsolete. It has been very difficult to make the desired changes, although we had inaugurated them in the code of 1902, and although we have made a great many changes by our rules of court (although there was some doubt about the legality of the rules) we now realize that the best method of making a reform is by this method.

Mr. GARD. Have you no practice code here?

Mr. FLANNERY. We have no practice code here. A few changes have been made in regard to special matters in this code of 1902, which is under consideration.

Mr. DANFORTH. Do you propose by this amendment to this section to leave it with the general term of the Supreme Court of the District

of Columbia to formulate the entire list of rules of pleading and practice?

Mr. FLANNERY. The court, of course, sitting in general term, after consideration of the matter with the members of the bar association is to formulate the rules of pleading, practice, and procedure.

Mr. DANFORTH. Covering the entire subject?

Mr. FLANNERY. Covering the entire subject. They do that now in regard to matters of practice, and we want to enlarge that somewhat in order to dispense with the necessity for a practice code.

Mr. TAGGART. Is it the theory that any violation of rules or an alleged departure from them could be assigned as error?

Mr. FLANNERY. Yes. As soon as they become rules of practice, the courts must comply with them, and the court above regards them as practically substantive law. They have all the force and effect of law.

We have provided for ample notice of the promulgation of any rule, and I might also state to the committee that we have also suggested to the court the desirability of appointing a fixed committee of the bar association to draft and suggest to the court rules of practice, pleading, and procedure, and the court has adopted that suggestion, and if this proposed act should become law, they would undoubtedly appoint that committee to aid the court in framing beneficial rules of practice, pleading, and procedure.

Another State, which I understand is endeavoring to do this, is the State of Illinois, where they have the common-law practice and procedure, just as we have it here. The Illinois procedure in equity matters, in fact, is almost identical with the practice here.

Mr. WILLIAMS. It has been discussed in each of the semiannual meetings of the State Bar Association of Illinois, but that association has never reached any conclusion on the subject.

Mr. FLANNERY. That is my understanding of it.

The CHAIRMAN. In these proposed changes the court is given power to change any existing law with reference to practice and procedure?

Mr. FLANNERY. These proposed changes do not give the court any right to change the substantive law. This proposition is simply in reference to matters of pleading, practice, and procedure.

The CHAIRMAN. You do not propose to give the court power to change any substantive law?

Mr. FLANNERY. No; there is no suggestion of that sort here.

The CHAIRMAN. Is that what is meant in line 3, on page 4, where it says "procedure prescribed by existing law as may be deemed necessary or desirable to render more simple, effective, inexpensive, and expeditious the remedy," etc.?

Mr. FLANNERY. No; that was to cover this: We have in the code certain forms of pleading and certain methods of practice outlined. For instance, in actions of replevin, ejectment, and matters of that kind. To make this effective we would have to give the court the right, by rule, from time to time, to modify those provisions of the code, otherwise this would destroy itself.

Mr. GARD. What would you think about retaining in the proposed amendment the language in the old law, as found on line 4, page 4, "may establish rules of practice in said special terms not inconsistent with the laws of the United States," and have that follow the new language at some point?

Mr. FLANNERY. We thought the words "not inconsistent with the laws of the United States" were in many ways surplusage, because every court in our jurisdiction is subject to will of Congress and the decisions of the Supreme Court of the United States, and they can not establish anything which is contrary to the laws of the United States.

The CHAIRMAN. Suppose we delegate that power in the proposed bill you have here?

Mr. FLANNERY. We have endeavored to confine it——

The CHAIRMAN (interposing). Do you think the use of the words "rules of practice" in the old law would not be broad enough?

Mr. FLANNERY. I think not. The amendment shows upon its face that it relates to a matter of procedure, wholly.

The CHAIRMAN. Covering both equity and law cases?

Mr. FLANNERY. Yes.

The CHAIRMAN. I suppose they would have the power to do that in equity cases now?

Mr. FLANNERY. The Supreme Court rules are the rules of practice in our equity suits in the Supreme Court of the District of Columbia, and the Supreme Court, from time to time, makes changes in its equity rules, and we are bound by those changes, as far as they apply to local equity cases. There are matters in equity proceedings where it would be desirable, because of peculiar local conditions, to have some modification made in the matter of equity procedure, and that is why we wanted to incorporate that in this particular form.

In new York State, where they have had this code of practice and procedure for many years, Prof. Pound says that "the code commission in New York has studied this matter and appointed a committee composed of John G. Milburn, Adelbert Moot, Adolph J. Rodenbeck, and a number of other lawyers whose names are familiar to the bar throughout the country; and they have come to the same conclusion, and have recommended this practice for New York."

Mr. WILLIAMS. Of course this will be an experiment?

Mr. FLANNERY. We think it would succeed. We have the example of England where, since 1875, they have been doing this very thing. They have a committee on practice and procedure, which prescribes the rules of pleading, practice, and procedure, under an act of Parliament for the government of all the courts of Great Britain.

Mr. WILLIAMS. But if this is practical at all, it could be demonstrated in a small jurisdiction, such as the District of Columbia, where the judges are all accessible to one another?

Mr. FLANNERY. Yes. If there ever was a place where you could have anything of this kind and get quick action in an experimental field, this would seem to be that place.

Here we have six judges who constitute the Supreme Court of the District of Columbia. They are meeting every day, in court, and around the luncheon table, discussing matters coming before them and yet frequently in that court you will find one of the judges deciding a matter of practice one way and another judge deciding it another way, simply because we have to go back so frequently to the common law for our pleading and practice. Where you have to do that you not only have to wade through a mass of obsolete decisions, but you have to abide by the conflicting opinions of men who are

holding the court at the particular time the matter is brought before them for consideration and decision.

The CHAIRMAN. What is the object of the last proviso, beginning at the end of line 20 on page 4, in the proposed amendment, which says: "*Provided*, That the general term may assign more than one justice to a special term for the trial of a given case"?

Mr. FLANNERY. Perhaps Chief Justice Covington can give you the real reason for that. It is evidently a proviso placed there by the court, and I assume the chief justice had in mind the Maryland practice and the practice in some other States of designating an additional judge to sit with the judge trying a particular case in very important controversies.

For instance, in Maryland, in the county circuits, that is the practice, and also in other jurisdictions. The county judge has the chief judge of that circuit sitting with him. The chief judge of the circuit, in Maryland, is a member of the court of appeals. That has proven to be very beneficial in the consideration of important matters, and sometimes there are cases here of very great importance, where the opinions of two members of the bench sitting together might be of great value, not only to the lawyers, but also to the litigants.

Mr. VOLSTEAD. We have a provision something like this provision in Minneapolis and St. Paul, where two or three judges may sit in the determination of an important case.

As I understand you, this provision is in reference to rules of pleading and practice, and contemplates making rules that would supersede statutory law.

Mr. FLANNERY. Only to this extent. In our code we have certain sections relating to pleading and practice, and to the extent that these rules will modify provisions of the existing code in reference to matters of pleading and practice, the new rules would supersede statutory law, undoubtedly. But there was no intention upon the part of the committee of bar association or of the court to make any change in the substantive law.

Mr. VOLSTEAD. May there not be some question as to whether we can delegate power in this way to the court?

Mr. FLANNERY. In reference to that point, I would like to read what Prof. Pound said. That very point has been raised every time the matter has been suggested.

Prof. Pound told the Ohio Bar Association that—

> At the end of the first third of the nineteenth century, at the recommendation of Mr. Justice Story, who was chiefly instrumental in the matter, Congress enacted that the Supreme Court of the United States might frame rules governing equity practice in the Federal courts; and in three decisions, in the most important of which the opinion was rendered by Justice Story, the Supreme Court of the United States said that the power to regulate procedure and practice in the court by rules of court is a judicial power, and there can not be any question of the competency of the courts to exercise it. In fact, they said the statute was not necessary. The Congress next committed practice in admiralty cases to rules to be framed by the Supreme Court. This was done in 1842. Next, in 1898, they turned bankruptcy practice over to regulation by rules of court. Next, in 1909, they turned over the regulation of practice in copyright cases. The same power was given to the Commerce Court by the act of 1911. So that in equity cases, in admiralty cases, in bankruptcy cases, and in copyright cases the power to regulate every detail of procedure is exercised by the Supreme Court of the United States through rules of court.

But, it did not stop there. The American Bar Association presently recommended that this same power be conferred upon the Supreme Court of the United States with respect to practice at law in the Federal courts. I was a member of the committee which first urged this, and afterwards appeared on three different occasions before the Judiciary Committee in the House and Senate when this matter was under discussion, and I can assure you it was very thoroughly discussed, because the members of that committee not naturally were all, I may say, "from Missouri" in reference to this matter when it was presented. They recommended it in successive sessions, but the act was held up at the last moment by some amendments of minor importance which do not affect the principle at all. There seems no doubt that the next Congress will pass the measure, as there is no longer any opposition.

You can see this matter has been very thoroughly canvassed, and its constitutionality has been passed upon by the authorities who are certainly entitled to a great deal of weight everywhere. But the code commission in New York has also studied this matter, a committee composed of John G. Milburn, Adelbert Moot, Adolph J. Rodenbeck, and a number of lawyers whose names are familiar to the bar throughout the country, and they have come to the same conclusion, and have recommended this practice for New York, and I suppose their report is probably just coming from the press and will be at hand within a day or two. When I left Cambridge I was told it was about to issue, so that there is ample material for you to consider on this matter, if you have any doubt upon it.

If I may say just a word upon the general theory of this committing of practice to rules of court. As I said originally, that was the usual way in which the English practice was regulated. This is, therefore, simply restoring to the courts one of their ordinary common-law powers, one that never ought to have been taken from them, and one that never would have been taken from them in my judgment if the judges in New York in 1847 had not been so obstinately conservative that they would not alter a detail of the old procedure inherited from England and compelled the invoking of the legislative steam roller in 1847. The way to avoid that is to put the power to govern procedure back where it ought to be, and entrust the making of rules of procedure to those who have to apply and interpret them. One of the principal difficulties which have been met with in codes of procedure has been that the legislature made the rules and the court interpreted them, and there was often a notable want of sympathy on the part of those who applied the rule with the rule as made for them by others. Now, if those who formulate the rule interpret it, you may be sure that you will be free from the difficulties which have injured so many well-drawn practice acts.

But a more important point: This practice of regulating procedure by rules of court is not anything new. It has been exercised in the Supreme Court of the United States in equity cases for three-quarters of a century. It has been exercised by the courts of England since 1875. It has been in force in New Jersey since 1912, and Colorado since 1913, and is in force as to administrative tribunals in no less than 24 States. We can know just how it works, and it has worked admirably. The first rule of the English judges was that all of the rules of the practice as it then existed should stand unless and until they were abrogated. Then they made changes one by one as they were needed. Instead of having wholesale changes by enacting a great big code which has to be studied from end to end, these changes were made gradually as the exigencies of the administration of justice called for them. When some rule worked badly, the court had before it the concrete instance of how it worked badly, and set to work to make a new rule to meet the case. For instance, some years ago a case was decided in the English Court of Appeals involving a question of costs. The rule as to costs had been adopted in 1875 and had been working pretty well, but in this particular case something arose that never had been thought of before, and it worked very badly, and the judges of the court of appeals expressed their grave dissatisfaction with a rule that compelled them to decide that case as they had to do. The next day a council of judges was called and a new rule was then and there promulgated that gets around the difficulty. What would happen in this country? This case would be decided; lawyers would comment on it; the court would say, "It is too bad we have to do this"; a bar association committee would call attention to it at the next meeting of the association; then there would be a grave objection by those who did not understand it; it would go over for another year; and at the end of four or five years it might possibly happen that the legislature would

enact a rule which would then be just as rigid and as unalterable as the one that was changed.

What is needed in a practical matter of this sort is the possibility of making changes when they are needed, to have the new rule made by the people who have to apply and interpret it, to have it made with reference to concrete cases, and to have pleading and practice develop from experience, just exactly as three-quarters of our ordinary substantive law does. If we could have the flexibility and power of growth in procedure that we have in our substantive law, I venture to say we should have had very little difficulty with practice in this country.

Let me see how many of you are in favor of a civil code? Wouldn't my learned friend here cry out at the top of his voice at such a proposition? But the very considerations that speel against a hard and fast substantive law speak fourfold against a fixed code of practice. I say everything which in your own mind urges you instinctively against a civil code ought to urge you against putting procedure into a like iron mold and in favor of leaving that in the hands of those upon whom rests the responsibility of making the judicial machinery achieve justice in its everyday operation.

Prof Pound further says:

It was generally believed, at the time codes of civil procedure were first enacted, that the legislature had no power to do what it attempted at all. The great lawyers of New York were almost a unit in so believing, but public sentiment required a reform of procedure and required it quick, and the matter never went further than some "dicta" by some of the eminent judges of New York in which they expressed their belief that they could not have been compelled to swallow that code. See, for example, the remarks of Selden, J., in Rubens *v.* Joel (13 N. Y., 488, 494–495) and in Voorhis *v.* Child (17 N. Y., 354, 357–362). But they were kicking against the pricks. The new code went over the country like wildfire, and became an established thing. If you will look into Judge Dillon's Law and Jurisprudence of England and America and a number of texts and books on the subject you will find the opinion has been very often expressed—indeed, once in a "dictum" by Mr. Justice Field, then on the Supreme Court of California, afterwards of the Supreme Court of the United States—that this was a judicial power which never ought to have been taken from the courts, and which might very properly have been challenged. Look at Houston *v.* Williams (13 Cal., 24), and see also "Ex Parte," Griffiths (118 Ind., 83). Now, if the legislature voluntarily gives this up and the courts succeed in making practice what I believe they will make it, and then some legislature comes along and undertakes to poke in some particularly obnoxious provision at the insistence of someone interested, then I undertake to say the people of the United States and the several States will be behind the courts when they say: "This is a judicial power; you have had your era, gentlemen; you have had your way in the codes of civil procedure of 3,000 sections which must be read from end to end; we have gone through the era where the legislative power prevailed and told the judge everything he should do from the time he entered the courtroom; we are back now to the point where it should have been all the time, and we think we will be supported in contending that it shall remain there.

Mr. VOLSTEAD. Does that reach the question? There is not any question but what the courts have had the power to prescribe rules, and if there had been no fixed, positive statute, no doubt rules could be prescribed. because that has been the practice in all our courts. But where we have fixed the rule by statute can we delegate the power to somebody else to repeal that rule?

Mr. FLANNERY. I do not think you are delegating that power. I think when you pass section 65 you are thereby exercising your power of repealing provisions of the code regarding these matters and allowing the courts to reestablish the matter by their rules of pleading, practice, and procedure. You are putting back into the courts power that has always existed.

Mr. VOLSTEAD. We had the same propositon at home in my own State. The proposition was also submitted to the Judiciary Com-

mittee to give to the Supreme Court the power to make rules and regulations for the trial of law cases. Objection was raised at that time, and they set out to repeal that by making a provision that when the rules were adopted, any revision of existing law in conflict with that should, from that time, be repealed. They made that provision and it was put in as an amendment to the bill.

The CHAIRMAN. Are you referring to bill No. 133?

Mr. VOLSTEAD. I am not certain about the number of the bill.

The CHAIRMAN. Was that the bill upon which former President Taft and Mr. Root appeared before the committee?

Mr. VOLSTEAD. That was the bill for which Mr. Taft and Mr. Root appeared, and they seemed to be somewhat impressed with the idea that the question might be raised as to the validity of turning over to a committee the power to repeal a statute.

Mr. FLANNERY. That is undoubtedly true. It is unquestionably true that Congress can not delegate its functions to a committee, for the purpose of allowing the committee to perform its real legislative functions. But what we attempt to do is to put back into the courts, where Justice Story says it always belonged, this power to regulate pleading, practice, and procedure by their own rules.

The CHAIRMAN. You are undertaking to give the courts the power to prescribe rules which conflict with existing law?

Mr. FLANNERY. Existing law on this particular subject.

The CHAIRMAN. The question is how do you know what the new law will be, and after you have made a new law, could you not insert here a provision that it shall then be the law of the district? That would cure it, would it not?

Mr. FLANNERY. If the Committee on the Judiciary, in its wisdom, should think that a provision of that kind should be inserted, we would not object.

The CHAIRMAN. I think that is the point to which Mr. Volstead referred. The idea was that after you have that in the code, and changed existing law, there ought to be some provision in the bill which verifies that, if the new rules shall have the force and effect of law.

Mr. FLANNERY. If the new rules shall have the force and effect of law?

The CHAIRMAN. Exactly.

Mr. FLANNERY. I think we would not have any objection to that.

The CHAIRMAN. If portions of the existing law were in conflict they should be repealed.

Mr. VOLSTEAD. You might provide that they should be repealed upon publication.

Mr. CARD. These are merely rules, which may be changed from time to time.

Mr. FLANNERY. Yes. Of course, after being adopted, the Supreme Court has held that the rules of court have the force and effect of law until they are changed.

Mr. DANFORTH. It seems to me if Congress were to enact this section. that that would be the law.

Mr. FLANNERY. I think so. That has been my view.

Mr. DANFORTH. It is not necessary to say this should be the law?

Mr. FLANNERY. That is true.

Mr. VOLSTEAD. I think the only question would be whether you should not provide that upon these rules being adopted that then they should not be in conflict with anything else.

Mr. FLANNERY. We have that repealing provision in the code, I think in the section at the end of the bill, that "provisions inconsistent herewith are hereby repealed."

The CHAIRMAN. This other language, beginning at line 18, on page 4, in the first column, and going on down to line 16, on page 5, in the first column, seems to be vague and useless.

Mr. FLANNERY. Yes: that is settled with the Potomac Flats litigation.

Mr. DANFORTH. I would like to ask the Chief Justice some questions in reference to the last two lines of the proposed section 65, at the end of page 4, "provided, that the general term may assign more than one justice to a special term for the trial of a given case."

I want to ask how many justices there are in the District of Columbia Supreme Court under the present law?

Judge COVINGTON. Under the present law there are six justices in the Supreme Court of the District of Columbia. That is rather misleading in its designation. That is the high court of original jurisdiction, conforming precisely to the New York Supreme Court, as distinguished from the court of appeals.

Mr. DANFORTH. Then your court of appeals has another set of judges?

Judge COVINGTON. The court of appeals of the District of Columbia has an entirely different set of judges. However, as you have asked that question, I may say that this is a rather anomalous court. This is not a State. It is a Federal jurisdiction. It has no separate Federal court. The result is that while we perform here in the Supreme Court of the District of Columbia all of the normal functions performed by the Supreme Court of the State of New York, we also perform the functions performed by and exercise all the jurisdiction exercised by your surrogates court. We also exercise all the jurisdiction exercised by the United States District Courts in the State of New York, in the various districts—the southern district, the eastern district, and the western district.

In addition to that we are compelled to exercise a unique and tremenduously important jurisdiction which no other United States district court exercises, in that all proceedings for a writ of mandamus of the law side of the court, or for an injunction upon the equity side of the court, directed to any one of the heads of the departments, to any one of the Cabinet officials, or to any of the heads of bureaus of departments, to restrain them from acting erroneously in construing an act of Congress, or to compel them to act where they are refusing to act, must be proceeded with in this court as the only United States court in the whole country where they can be proceeded with.

At the present time I happen to recall that Mr. Hoehling is the counsel in a case involving such a large amount of money that I almost hestitate to mention it—involving, I believe, some $300,000,000 or $400,000,000 worth of land, all of it west of the Rocky Mountains in which is drawn in question the attempt of the Secretary of the Interior to interpret the land laws of the United States against the

interests of the clients, whom, I believe, Mr. Hoehling and others represent—the Southern Pacific Railway Co.

Our court is the Supreme Court of the District of Columbia, having six justices sitting separately, as we are compelled to do, each holding court in a separate division. Those divisions are formed in this way: There are two circuit divisions for the trial of civil controversies before juries. There are two divisions sitting in equity to hear the ordinary litigated controversies arising at equity, between citizens. There is a division sitting as a United States district court. There is a division sitting as a probate court. There is a division sitting as a bankruptcy court. There are two divisions sitting as criminal courts—trying all of the ordinary criminal controversies of a more important nature arising here in the District—which are tried before a jury.

Mr. DANFORTH. What judges make up your general term?

Judge COVINGTON. By general term we mean the six judges.

Mr. DANFORTH. Those six judges.

Judge COVINGTON. Yes: sitting in the aggregate to do no controversial business, but sitting to perform the rather numerous administrative functions that are, of course, necessary in the conduct of the business of a court of that sort. The general term includes the six judges, the chief justice and five associate justices. That is the general term denominated in the section as the body which shall, in the aggregate, prescribe these appropriate rules of pleading, practice, and procedure.

Mr. DANFORTH. That brings me to the particular question that I wanted to ask you. Does that allow or is that sufficient to enable the entire six judges to decide the case in trial, as a body, all sitting together.

Judge COVINGTON. I think some member of the bar association can answer your question in regard to that.

Mr. DANFORTH. It was left to you by the last speaker of the bar association committee.

Judge COVINGTON. That is intended to produce this situation, and it would not ever resulted in what I think you apprehend.

Mr. DANFORTH. It would be possible?

Judge COVINGTON. There are, at times, cases of transcendent importance in which, in other jurisdictions, there do sit more than one justice, in order that more than one of these justices may participate in the all-important rulings that may come up. Two justices frequently sit in the district courts of the United States. The Circuit Court of Appeals, as you know, has the power to have one of the judges from the district court come up and participate in the hearing in the Circuit Court of Appeals in an important case.

Now, it is intended that in this rare instance, where, by reason of the magnitude of the case, the length of the trial, the knotty legal problems that may be involved—and that probably would not happen more than once in three or four years—that the general term itself may have the power to assign the additional justice to sit in the trial of the case. Of course, it would be possible to have the situation which you have in mind, I think, but after all there must be some elasticity in statutes of this kind. It would be possible to assign six justices under that provision, but I think that only exists

as a possibility. As a probability I should say it never would exist.

Mr. DANFORTH. I do not know that it would do any harm. I misunderstood the situation in regard to the Court of Appeals. I believe the appeal is taken to an entirely different court, a different set of judges?

Judge COVINGTON. Yes. Mr. Flannery also calls my attention to something which we did consider at that time, and which had entirely escaped me. That is this: If we assigned the six judges, it would be a special term, special terms being very carefully differentiated from the general term. As soon as you get the court together, get the six judges in the aggregate, we would become, automatically, the general term of that court, and this bill provides that no cause shall ever be heard in the general term, so that it would be impossible under the provisions of that section for the chief justice and the five associate justices of the District Supreme Court to be meeting together.

The CHAIRMAN. It is an extremely improbable thing?

Judge COVINGTON. Yes, sir.

Mr. DANFORTH. You have answered the question very fully.

Mr. NELSON. In what instances do you sit as a supreme court.

Judge COVINGTON. Supplementing what I said to Mr. Danforth, the term "supreme court" as a title is an erroneous description of this court. Outside of this jurisdiction and the State of New York I know of no jurisdiction in the United States where a court of original jurisdiction is described as a supreme court.

Strictly speaking we are the highest court of original jurisdiction. We have no appellate jurisdiction. There was a time—it may have been the time when the designation was given—when this court not merely sat as a court of original jurisdiction, but sat in banque to hear cases with, I think, at least three justices. The whole system was modeled after the New York system. We had at that time an appellate division, drawn from the membership of this court and then it was in reality the Supreme Court of the District, and there was no other court of that kind here.

The members of this court sat as appellate tribunal and reviewed decisions of single judges trying cases below, and their opinions were written and filed, became volumes of reports, just as in the case of courts of appeals in every jurisdiction. That is very similar to the way in which the appellate division in New York is differentiated from the court of appeals.

Mr. DANFORTH. That was what was misleading me.

Judge COVINGTON. In 1893 Congress abolished that appellate jurisdiction of this court. It did not change the name, but it created a court of appeals. There is now a court of appeals in the District of Columbia, which is a court of appeals for the District of Columbia, and also a court to hear all patent appeals, on appeal from the orders of the Commissioner of Patents. That court also entertains all appeals from the Supreme Court of the District of Columbia sitting in the various divisions. This court no longer has appellate jurisdiction although it is denominated the Supreme Court of the District of Columbia.

Mr. WHALEY. Where do the municipal cases go?

Judge COVINGTON. That court being what was formerly the justice of the peace court, the cases from that court now come up in the ordi-

nary way in which cases from the justice of the peace court would come to the supreme court, where there is an appeal de novo. In an appeal of that kind they are carried up either on what is called municipal appeals, or on certiorari.

Mr. WHALEY. What is the effect of the appeal?

Judge COVINGTON. The effect of the appeal is that there may be an entirely new trial before a jury. Then from the judgment there, under our cumbersome system there may be still a regular appeal on the record, and that may be transmitted to the court of appeals, the court of appeals reviewing the trial in the supreme court.

Mr. WHALEY. Do you have a jury trial on an appeal from the municipal court?

Judge COVINGTON. Yes; that is what I referred to when I stated that there was a trial de novo. It is an entirely new trial. It is a trial which is called by common law de novo, where nothing that has taken place below is under review, but where the whole cause is tried as if the case had never been tried before. All the issues are submitted to the jury, and the entire case is presented as if it had not been presented before. That is the matter I referred to when I said we had another bill here providing for the reform of this cumbersome procedure.

Mr. TAGGART. Theoretically, in cases of that kind you sit in place of the municipal court?

Judge COVINGTON. That is correct, and with the very great disadvantage of not being in a situation where we can compel formal pleadings, and where we can not hedge the case around with any of the necessarily formal pleadings by which the issue may be narrowed and restricted.

Mr. WHALEY. It is really not an appeal; it is a new trial.

Judge COVINGTON. It is a new trial. As has been suggested, there is no jury now in the municipal court, and where the controversy is over an amount concerning which there is a constitutional right to a jury trial, they are entitled to have a jury trial when they take the case up.

Mr. WHALEY. In the ordinary criminal case, are they not entitled to a jury trial in a municipal court?

Judge COVINGTON. That is an entirely different matter. The municipal court, as we have it here, must not be confused with the police court, which has no connection with the municipal court whatever. There is a police court here which is entirely distinct from the municipal court.

Mr. WHALEY. Do you get in the Supreme Court of the District an appeal from the police court?

Judge COVINGTON. We do not get those cases on an appeal. The police court is a mere committing magistrate as to other classes of cases, except municipal cases. It sits as a committing magistrate, and if it thinks there is enough evidence to hold the party for the action of the grand jury, it does hold him, and the case is transmitted to the grand jury, and then the party is indicted and he is entitled to a jury trial.

Mr. WHALEY. Where do the cases go from the municipal court, or from the committing magistrate's court? Where does the committing magistrate have jurisdiction to send those cases? Justice Pugh, I believe, holds recorder's court.

Judge COVINGTON. That is a police court.

Mr. WHALEY. Where does an appeal go from that court?

Judge COVINGTON. Directly to the court of appeals, if it is a case in which that court has complete jurisdiction to hear and determine the case. From the sentence imposed in the police court there is a direct appeal to the Court of Appeals of the District of Columbia. There is no intermediate hearing in the Supreme Court of the District of Columbia, but it is a direct proceeding in the court of appeals, initiated upon a writ of error rather than an appeal, and we have nothing to do with it in the Supreme Court of the District of Columbia. That is the point. It is a direct appeal to the court of appeals.

Mr. WILLIAMS (presiding). What member of the bar association committee will be heard in reference to the next section?

Mr. HOEHLING. The next section is on page 5. That is simply to correct what was in section 67 before in reference to the certifying of one case from one special term to another. We simply changed the language so that it would read that the "causes may be certified by any justice holding a special term to any justice holding any other special term of certain courts for trial in the latter." That we inserted this proviso: "*Provided*, That a criminal case can only be certified for trial from one criminal court to another criminal court;" that is, provided that a criminal case may only be certified as between the two criminal divisions. There is no other change in that section, I believe.

Mr. GARD. You seem to have added a new paragraph on page 6, which, it seems, is to come at the end of section 105.

Mr. HOEHLING. That is in reference to section 105, on the next page; that is another section. It is proposed to amend section 105 with reference to publication against nonresidents in this way:

Personal service of process may be made by any person not a party to or otherwise interested in the subject matter in controversy on a nonresident defendant out of the District of Columbia, which service shall have the same effect and no other as an order of publication duly executed. In such case the return must be made under oath in the District of Columbia and must show the time and place of such service, and that the defendant so served is a nonresident of the District of Columbia.

That was simply to supplement the provision we have now, under which publication for a certain number of days may be substituted for personal service of process.

Mr. DANFORTH. There is no personal service without the District?

Mr. HOEHLING. There is no personal service without the District. This new paragraph authorizes that, provided that where a nonresident is personally served, that that personal service will have the same effect as publication.

Mr. GARD. Under what circumstances would a nonresident be personally served?

Mr. HOEHLING. On proceedings in rem, in cases affecting property.

Mr. GARD. Personal service may be had in this case, may it not?

Mr. HOEHLING. Not under our code.

Mr. GARD. This section provides for that. Of course, it would not affect any property rights.

Mr. DANFORTH. Is it not unnecessary to say that the return shall be under oath here? If you had a case where you want to serve a sum-

mons personally in Ohio, for instance, apparently this paragraph would require the man who makes the return and who swears to that service to make his oath in the District of Columbia?

Mr. HOEHLING. I may say that that was a provision which was a subject of considerable conference, and the idea of the court seemed to be that there ought to be some responsible oath within the jurisdiction of the court, which they could control, so that an arrest could be made in a case of false swearing.

Mr. VOLSTEAD. We have the same provision in our State.

Mr. HOEHLING. That was the reason for it.

Mr. IGOE. Why could it not be made by some officer there?

Mr. HOEHLING. To be perfectly frank with the committee, my own idea was that service of that kind could be and should be made by some responsible officer in the place of service.

Mr. WILLIAMS. Some one from the District known to the court as a responsible person?

Mr. HOEHLING. Yes. Our own court seemed to feel that they ought to have an oath from some one who would be responsible to the court.

Mr. VOLSTEAD. You would not be able to make service across the line?

Mr. HOEHLING. Not unless you sent some one.

The CHAIRMAN. Why not send your process to some officer and let him make the return? That is the way we do it in our State.

Mr. DANFORTH. You might let it be done by the sheriff, or the marshal, or the deputy marshal of the Federal court. It seems to me that this nullifies what you are aiming to do; that is, to save expense.

Mr. HOEHLING. That is true.

The CHAIRMAN. Under this provision, if you wanted to make personal service on some one in California you would have to send some one out there to make the service?

Mr. HOEHLING. Yes.

The CHAIRMAN. And that would be quite expensive.

Mr. WILLIAMS. Your purpose is to guard against service by irresponsible persons?

Mr. HOEHLING. Yes.

Mr. WILLIAMS. Could that not be done better by providing that service should be made by some officer designated in the community where service is to be had? Could not that be done better in that way? Then you would know by the return that it was made by a duly authorized person. In this way you are to avoid the process being served by an irresponsible person, and to require that oath to be made in the District of Columbia, which would necessitate sending such a person, in some cases, to some distant place. Could you not accomplish the same purpose by authorizing the service to be made by some officer to be named?

Mr. HOEHLING. By a United States marshal, for instance.

Mr. GARD. You might provide that the service should be made by a United States marshal or by his deputy.

Mr. HOEHLING. Would that be satisfactory?

Judge COVINGTON. We have no private opinion in regard to the matter.

If you will note what is provided by the existing law, I will state what that was intended to accomplish.

It was inserted after being directly submitted by the court, and not as a proposition originating with the committee of the bar association. It was done in order to gratify certain lawyers who felt that the existing law imposed an undue hardship in requiring orders of publication in that class of cases where the people were just over in Maryland or Virginia. This was submitted simply as an expansion of the existing law.

They now have to have an order of publication if the person lives just across the line, because he is a nonresident. This does not forego the existing law in regard to an order of publication where the person lives in California. It may be done in a very less expensive manner in the case of a person here in the District, who could go out into Maryland 10 miles and come back and make his return. That is really what it was intended to accomplish, and all it was intended to accomplish. There was no effort to cover all possible contingencies.

Mr. WILLIAMS. Why not provide that this may be done within a limited district, say, within 50 miles or 100 miles?

Judge COVINGTON. With great deference, Mr. Williams, we feel that would be an inelastic provision, and the reason is very simple. For instance, here in Washington it is not a very great expense. A man could have a process served in Baltimore for $1.50, as against an order of publication that might cost $25. On the other hand, there are other localities nearer to Washington in point of distance than Baltimore, where it might cost more than $1.50 to have service.

The CHAIRMAN. I see no objection to the language as used, in view of the fact that it does not change the law.

Judge COVINGTON. It is intended to be an expansion of the existing law, to give them more than they have at the present time.

The CHAIRMAN. If a man is in California you can publish on him?

Judge COVINGTON. Here is the point: The representatives of plaintiffs who are not well equipped in this world's goods wanted to avoid the service of process by publication where it was a mere matter of a man's being in Virginia or in Maryland, only a few miles away.

Mr. GARD. Suppose the case of a party who had means. Suppose you send a man down to the State of South Carolina, or North Carolina, and you incorporate that provision in the bill, and then that is assessed against the defendant. Should not the opportunity for that be prevented?

Judge COVINGTON. I think so. There was a suggestion made, which, personally, I subscribed to, and which I subscribe to now, that if in any case, no matter how far away a man may be located, the party who is interested is desirous to have personal service by a person whom he appoints to send away, and is content that, notwithstanding the outcome of the case, that service shall be taxed as a part of his costs, he ought to have that privilege. But I do not think, in a case where a man is located in Oregon, for instance, where it would cost $250 or more to serve a process personally, and he could get service by publication, that that amount ought to be taxed as a part of the costs.

Mr. IGOE. In divorce cases, now, where the plaintiff lives in California, for instance, do you not secure personal service through an officer in California?

Judge COVINGTON. No.

Mr. IGOE. Do you not think it is better to get personal service on a defendant in a divorce case by publication?

Judge COVINGTON. That carries one into a realm——

Mr. IGOE (interposing). In the State of Missouri we have a provision that where personal service is good in actions in rem, that the local officer may make the service.

Judge COVINGTON. That carries you into a field which started with the Haddock case, and the limit of which no man could tell, as to where we ought to have personal service or ought not. In a divorce case, I do not know.

Mr. IGOE. In any of these cases, as far as that is concerned, the idea is to get the actual notice to the defendant. In our State a summons is issued, and the regular fee is taken by the justice of the peace. That is better than service by publication.

Mr. TOBRINER. In divorce cases the rules of practice provide that a copy of the order of publication shall be sent by registered letter——

Mr. GARD (interposing). Do your divorce laws permit the allowance of alimony to be made by order of publication?

Mr. TOBRINER. No; they do not.

Mr. VOLSTEAD. In our State, we do not provide for any man being served outside of the State. This provision seeks the securing of service in that fashion, if it is outside of the State. I think it is better to require or permit personal service, and make that go as far as possible, for this reason: It is more likely to bring the thing home to the person himself under this code than under most of our codes. The defendant does not get any notice at all, under many codes.

Mr. DANFORTH. What harm could it do to change this wording and to say that in such case service would be made by the sheriff of the county, or the marshal or deputy marshal of the United States court, and return must be made under oath, leaving out the words, "In the District of Columbia"?

Judge COVINGTON. Leaving out the words "In the District of Columbia," I do not think that is a matter of vital importance.

Mr. DANFORTH. It would cover all you are after, and I think it would reach near-by cases, where, if the return is brought in it would cost about $2, whereas the publication of the summons would cost $15 or $20.

Judge COVINGTON. I speak merely for myself, but I presume the committee of the Bar Association probably think likewise, in saying that so far as the court is concerned, it does not consider that that would be a change that would do any harm at all. It might be a very good thing.

Mr. DANFORTH. It would be beneficial to the litigants.

Judge COVINGTON. There would be an added protection, if you could get your service.

Mr. BOEHLING. I think it would be very advantageous.

I think I can make a suggestion along that line that would probably cover the point. That is to strike out the words "in the District of Columbia," on lines 10 and 11, on page 6, and insert the words "Unless the person making the service be a sheriff or deputy sheriff, a marshal or deputy marshal, authorized to serve process,

where service is made, the oath must be made in the District of Columbia."

Judge COVINGTON. The idea was that we should not have an oath of an irresponsible person, but that we should have the oath of one whom we could hold responsible.

Mr. VOLSTEAD. I would insist on an oath from a sheriff, anyway.

Judge COVINGTON. This does.

The CHAIRMAN. But it does not have to be made in the District of Columbia.

Mr. SULLIVAN. Unless a person making service is a marshal or sheriff, or a deputy marshal or a deputy sheriff, authorized to serve process in the place where service is made, the oath must be made in the District of Columbia. That is the amendment for the change that is suggested. If we have an individual who resides here, and he should make service, unless he should come here and make oath, it would not make him amenable to the perjury laws here, and so it is suggested that this change be made. Such a man would not be amenable to the perjury laws here, and he could not serve unless he be a sheriff or a deputy sheriff, a marshal or a deputy marshal.

Mr. MATTHEW O'BRIEN. You could say the process should be served, this being a United States court, by a United States marshal, or an indefinite person, and where served by an indefinite person the oath be made in the District of Columbia. Then we would get responsible personal service and meet that objection.

Mr. TAGGART. Your oath does not provide that where titles might pass in any litigation, where there is service by publication, but your code provides that the interested parties may come into court within a reasonable time and move to set aside and retry, does it not?

Mr. EASBY-SMITH. That is in probate cases.

Mr. HOEHLING. Forty days is the ordinary time; publication once a week for three weeks.

Mr. TAGGART. Then you take a judgment immediately?

Mr. HOEHLING. At the end of the time, if he does not come in, we are required to send notice by registered mail to his last named or last known address.

Mr. TAGGART. Suppose you proceed against real property——

Mr. HOEHLING. At the end of 40 days——

Mr. TAGGART. Then you can sell under a judgement proceeding and give title?

Mr. HOEHLING. Yes.

Mr. TAGGART. Is the defendant at liberty to come into court within a reasonable time?

Mr. HOEHLING. No; except in will cases. There is a certain length of time.

Judge COVINGTON. That is practically unknown in all the States on the Atlantic seaboard.

Mr. TOBRINER. There is only a judgment of condemnation. There is only a judgment in rem.

The CHAIRMAN. Is there any suggestion as to who shall pay the expense of serving process?

Judge COVINGTON. That would be taxed in the costs.

The CHAIRMAN. Suppose the amount was $100, would it be done in that way?

Judge COVINGTON. Yes.

Mr. VOLSTEAD. I think there ought not to be any mileage allowed outside of the State.

The CHAIRMAN. I think if a man has the advantage of the personal process he ought to pay the expense. That is what we require in our State. I think that is the better way to do it.

Now, Mr. Hoehling, will you explain the changes in section 115a, on page 6?

Mr. HOEHLING. In connection with what you said, Mr. Chairman, I think you are right with regard to the matter of costs. If the service be made by the marshal or deputy marshal it would probably cost $2 or $3, and it would be a saving in time, and would be an advantage to the one who brought it about. If he wanted to send a man in California, he should be made to pay for that. I think you could put a provision at the end of the section to the effect that the cost of such service be borne by the party on whose behalf it is made.

Mr. DANFORTH. It will reduce the cost. If you can get it done for $2 in that way, it will be a good deal cheaper than having it done by publication, which might run the costs up to $30 or $40.

Judge COVINGTON. That, of course, is only in the event the person elects to do it in that way. That is only in case he chooses to send an individual out, to use a private person in the District, and to send him away.

Mr. HOEHLING. How would it do to leave the assessment of the cost to the discretion of the trial judge?

Mr. WILLIAMS. I think you had better amend it to that the man who makes the selection of service as between publication and personal service shall pay the bill.

Mr. HOEHLING. I think that is fair. The cost can not be very large.

The CHAIRMAN. Will you now explain the changes in section 115a on page 6?

Mr. DANFORTH. Will you allow me to suggest an amendment to section 105?

Judge COVINGTON. There has been an amendment suggested to the effect that the assessment of costs shall be left to the discretion of the trial judge.

The CHAIRMAN. In section 115a, which is in reference to lunacy proceedings, I notice the first change suggested is in line 19, where the word "the" is changed to the word "a," and then, beginning at line 21, the provision in the existing law, "and, when necessary, may use a jury from either the circuit or criminal court, or may cause a special jury to be summoned for such inquisition," is changed to read, "and may impanel a jury from among the petit jurors in attendance in the Supreme Court of the District of Columbia."

Mr. HOEHLING. Practically the only change in that section is that instead of having a special jury the jury may be drawn from among the petit jurors in attendance in the Supreme Court of the District of Columbia. We have a provision for a new jury system which comes along in some later sections of the code as found in this bill, and this language in section 115a is made to conform with those later changes, so that the jury we have in attendance upon the Supreme Court may answer all the necessary jury needs in the courts.

The CHAIRMAN. Suppose your jurors are all busy?

Mr. HOEHLING. That matter will be thoroughly explained when we reach the sections with reference to the new jury system.

Mr. GARD. Do you have any special court having charge of lunacy proceedings?

Mr. HOEHLING. There is one of the divisions of the Supreme Court of the District of Columbia that sits in lunacy cases.

Mr. VOLSTEAD. Do you mean to say that an ordinary jury passes on the question of a man's sanity?

Mr. HOEHLING. Yes.

Mr. IGOE. The jury does that after hearing testimony in reference to a person's sanity, I suppose.

Mr. HOEHLING. Of course the jury is guided by the testimony in the case.

Judge COVINGTON. That is under the control of the court also. The court supervises very closely the judgments rendered in such cases, exercising a very wide discretion in compelling a continuance of a case in which it is not determined satisfactorily to the court that the testimony is of such a character that it should be submitted to the jury, and requiring substantial evidence from medical experts before the question of a man's sanity can be submitted to the jury.

The CHAIRMAN. The next provision is a new section, section 123a, found on page 7. That is in reference to continuing a decedent's business. Will you explain that?

Mr. HOEHLING. It is proposed to insert immediately after section 123 a new section reading as follows:

> The said court may, in its discretion, authorize any fiduciary appointed by it to continue the business of his decedent for a period not exceeding six months after decedent's death. No order shall be entered so authorizing a fiduciary until he shall have filed a petition under oath, supported by the affidavits of two reputable persons familiar with the decedent's business, setting forth the appraised value of the business, whether the decedent conducted it at a profit or loss and the approximate amount thereof, and the estimated expenses per month necessary to be incurred in order to continue the business. Any fiduciary who is given such authorization shall file monthly statements showing all receipts and disbursements, debts contracted and obligations incurred, and the profit or loss; and the court, in its discretion, may order the discontinuance of the business at any time.
>
> Debts contracted and obligations incurred by the fiduciary in so continuing the business of the decedent shall be deemed to be an expense of administration of the estate.

That is suggested because we have no existing provision of law under which the business of a decedent can be continued temporarily, until it may be disposed of. The provision appealed to the members of the committee, because in a case where a man dies having a going business it would be very detrimental to close the business, and the probate court would not have the authority to authorize the temporary continuation of the business, the cost of running the business to be charged as an expense of administration.

The CHAIRMAN. Is there anything new about that?

Mr. HOEHLING. This is only new to us. It is not a new proposition in the States.

Mr. DANFORTH. What State has any such proposition as this?

Mr. HOEHLING. I do not recall just at the moment, but as I understand it, such a provision as that is very general in the different States. I did not draft this particular section.

Mr. DANFORTH. You have there an authorization which is not given under probate law in any State I know of unless it is specifically authorized in the will.

Mr. HOEHLING. Yes.

Mr. DANFORTH. It seems to me that that is a rather dangerous authority.

Mr. VOLSTEAD. Our courts have it.

Mr. TAGGART. What is the meaning of the word "his" in line 5, "the business of his decedent"?

Mr. HOEHLING. That refers to the fiduciary.

Mr. TAGGART. It refers to the fiduciary?

Mr. HOEHLING. Yes.

The CHAIRMAN. What do you mean by that?

Mr. HOEHLING. It is, of course, only authorized in the discretion of the judge, upon a showing made, and only for a limited time, as the section says, "for a period not exceeding six months after the decedent's death."

Mr. WHALEY. Why did you fix the term at six months?

Mr. HOEHLING. We thought that was long enough.

Mr. WHALEY. There is a year in which to clear up the estate.

Mr. HOEHLING. I can not answer definitely why six months was the term adopted. I think Mr. Sullivan can explain that more clearly than I can.

Mr. SULLIVAN. This section was drafted at the request of the deputy register of wills, who has had great experience in this matter and knows how the matter works out, and he reported that there are a great many estates in which if the business is not conducted for a short period after the death of the decedent it works detrimentally to the interests of the business and the estate, especially in a business where the good will is the principal asset. He thought six months would in every case be the outside limit during which the business would have to be conducted, so that it could be sold thereafter. That is particularly true of the saloon business where it generally works out that way.

Mr. WHALEY. Some of us think the saloon business could be wound up in six hours.

Mr. SULLIVAN. It is not in the interest of the saloon.

Mr. WHALEY. I should think not exceeding 12 months would be sufficient. You are limiting it to six months.

Mr. HOEHLING. I see no objection to making it 12 months. That would make it consistent with the ordinary continuance of the year.

Mr. TAGGART. In the discretion of the court; you might make that provision.

The CHAIRMAN. The next section is section 126, on page 8. That is in reference to the enforcement of duty. Will you explain the proposed changes in that section?

Mr. HOEHLING. The changes we propose in section 126 simply amend the present section 126 in respect to the fiduciary who is appointed by the local court, and thereafter removes from the District of Columbia. There is an absence of power on part of the court to reach that exact situation. We propose to add to the present section 126 this provision:

In case the summons to appear is returned by the marshal "not to be found," an alias summons shall be mailed to the last known post-office ad-

dress of such fiduciary or served upon his attorney of record, if he be within the jurisdiction of the court; and on the failure of such fiduciary to appear, the court may revoke his letters and make such further order and other appointment as justice may require.

We think that is a very proper provision.

The next suggested change is on the bottom of page 8, where we propose to insert immediately after section 137 a new section, to be known as section 137a, reading as follows:

While issues raised by a caveat are pending, either for trial or on appeal, no prior will shall be admitted to probate.

The reason for that suggested provision is this: The amendment was suggested by Justice McCoy of our local court, and it grew out of this situation:

There has been in the District of Columbia quite a celebrated will case which is known as the Hutchins will litigation, which, I have no doubt, you have read about in the newspapers.

Mr. Hutchins left three paper writings, purporting to be last wills and testaments. The last one was contested, and the verdict of the jury declared it was not his will, and from the judgment entered on that verdict an appeal was taken to the Court of Appeals of the District of Columbia. While that appeal was pending, will number two was presented for probate as Mr. Hutchins's last will and testament.

The CHAIRMAN. That was a prior will?

Mr. HOEHLING. That was a prior will. Justice McCoy ruled that he would not take any action on will number two until the last will had been disposed of, and we have no proper provision of law at the present time to cover that kind of a case.

The CHAIRMAN. Have you any statute of limitations within which a will shall be filed for probate?

Mr. HOEHLING. No; we have not.

The CHAIRMAN. This section which you now propose to add. 137a, does not cover that?

Mr. HOEHLING. Not at all.

The CHAIRMAN. This section only provides for the suspension of action while the first will is pending in court?

Mr. HOEHLING. Yes.

The CHAIRMAN. The next section in which you propose changes is section 140 in reference to trial of issues as to wills. Will you explain the changes you propose in that section?

Mr. HOEHLING. The only change we provide in that section is to provide that the issues in which all persons interested are sui juris, if they are to be tried by a jury, shall be triable in the probate court by petit jurors drawn for service in the Supreme Court of the District of Columbia. That is to make this section conform with the provisions of the next section which provides for a revised jury system.

The CHAIRMAN. What is the method in such cases now?

Mr. HOEHLING. These will contests are tried in the criminal division No. 2, and they are tried by juries that are sitting in that particular court. We want to have the entire jury panel available in will contests when the need arises.

The CHAIRMAN. Are all will cases tried in Criminal Division No. 2?

Mr. HOEHLING. Under our present arrangement.

Judge COVINGTON. That matter will come up particularly in your later discussion in reference to the overwhelming necessity for more judges in a District that has grown in 20 years as this District has grown, and in which the volume of Federal business has increased so rapidly. That is an example that shows how we are now driven to such a shrift. Having no court available for the disposition of contested will cases, we have to put them in a criminal division.

Mr. HOEHLING. We have to try those cases in a criminal division of the supreme court.

Judge COVINGTON. This criminal division tries criminal cases primarily, and it also tries lunacy cases, and will cases, and all appeals from the municipal court.

Mr. IGOE. I notice in line 11, page 9, that it refers to the Supreme Court of the District of Columbia. What court is that which is there referred to?

Mr. FLANNERY. That means the Supreme Court of the District of Columbia, composed of six judges. We have two courts assigned for jury cases in civil matters, called circuit courts. We have two equity courts and we have two criminal courts, and one of the criminal courts takes care of all the miscellaneous matters.

The CHAIRMAN. I wish you would explain again that new matter in section 140 in reference to the jurors.

Mr. HOEHLING. The insertion of the language in reference to will cases which are tried by a jury, that they shall be triable in the probate court "by petit jurors drawn for service in the District court of the District of Columbia," is to make available the jurors drawn for the supreme court.

The CHAIRMAN. All sections of the supreme court?

Mr. HOEHLING. Yes. Under the new section——

The CHAIRMAN (interposing). Those cases are now tried by the jurors in one division of the supreme court alone?

Mr. HOEHLING. Yes. Under the discussion of the new jury system that matter will be explained. The provisions with reference to the new jury system will be found beginning at page 9 of the bill now under consideration by the committee.

The CHAIRMAN. I see you have stricken out lines 17 to 25, inclusive, in column 1, on page 10.

Mr. HOEHLING. It is necessary in order to make it conform to the provisions of the new jury system.

That brings us, Mr. Chairman, to page 11, where we have a new provision for a jury commission. Mr. Easby-Smith had charge of this particular section of the bill, and he will explain that to you.

Mr. EASBY-SMITH. Mr. Chairman, I think I can explain in a very few words what the present jury system is and how we propose a radical change in the method of distributing the jurors.

You have already learned that we have at the present time two courts where civil trials are held. Those are the two circuit courts.

The judges sit in special term, one judge holding Circuit Court No. 1 and the other judge holding Circuit Court No. 2.

Then we also have two criminal courts. There is a jury in each of those two courts. Furthermore, we have jury trials in lunacy cases, in will contests, and in some matters coming before the United States district court.

In addition, we have three systems of condemnation of streets, alleys, and lands for public purposes, etc. In some of these proceedings they use five jurors, in some they use seven jurors, and in some they use three commissioners.

In order to provide a grand jury consisting of 23 members, and petit juries consisting of a panel of 26 men in each of four courts the two circuit courts and the two criminal courts, there is at the present time a jury commission composed of the United States marshal, the clerk of the Supreme Court of the District of Columbia, and the collector of taxes of the District of Columbia.

The members of this jury commission are supposed to keep the names of the jurors in a box, and from that box the jurors are drawn from time to time.

The terms of the circuit courts, the terms of the criminal courts, and the special terms in all the courts are regulated by rule of the Supreme Court of the District of Columbia, and they are not coincident. The terms of the criminal courts are not coincident with the terms of the circuit courts.

Mr. VOLSTEAD. You mean they do not sit at the same time?

Mr. EASBY-SMITH. They do sit at the same time. The criminal court may begin in January, and cover January and February, and the circuit court may cover February, March, and April. The terms are not coincident.

The present law provides for the drawing of 26 petit jurors for each of the trial courts, except for the trial of will cases, the latter being certified for trial from the probate court to the criminal court No. 2. If you will turn to page 10 you will find there is in the present law a provision, beginning at line 5 on page 10, in the first column, reading as follows:

Before the time of trial the justice holding said court shall direct 24 jurors to be drawn for service in said court, having the qualifications prescribed by law, in the manner provided by law for the drawing of jurors to serve in the circuit court.

That would provide for the drawing of a special panel of 24 men for every will contest that may come up for trial in criminal court No. 2.

Having in the circuit courts a panel of 26 men only there is great delay, and for this reason: We have in the trial of civil cases a struck jury. The clerk of the court furnishes the counsel a list of 20 jurors, and counsel has the right to strike 4 names from that list, or he has 4 peremptory challenges, and the clerk of the court must give counsel a list of 20 names. If each counsel strikes 4 names from the list that leaves 12 names, and those men constitute a jury to try the case.

Mr. IGOE. Are those challenges for cause?

Mr. EASBY-SMITH. They would be eliminated on the voir dire.

Mr. GARD. Is it intended in your plan of reorganization with reference to the jury system to dispense with the provision for struck juries?

Mr. EASBY-SMITH. Not at all.

The CHAIRMAN. Is there a law now with regard to struck juries?

Mr. EASBY-SMITH. That is the law at the present time. You have a right to examine the whole array on the voir dire, and if there is

any cause by which a man is disqualified, he is eliminated. After that is over the clerk of the court gives you a list of 20 names, and you have the right to strike 4 names from that list of 20, and the other side also has the right to strike 4 names from that list, and that amounts to 4 challenges for each side.

Mr. WHALEY. After those 12 men go into the jury box you have a right to show cause why a man should not be allowed to sit in that case, if you can show cause why he should not be allowed to sit.

Mr. EASBY-SMITH. No.

Mr. WHALEY. Does not the judge always ask if there is anyone on the jury who is interested in the case?

Mr. EASBY-SMITH. Counsel does that. The whole array is told to arise, and if counsel choose they have a right to ask if any members of the jury are in any manner interested, or also to bring out any reasons for cause why a juror should not sit in that particular case, and if a reason arise why a juror or jurors should not sit they are eliminated.

Mr. NELSON. They are eliminated by the court?

Mr. EASBY-SMITH. They are eliminated by the court before the list of 20 names is given to counsel. So that the term "struck jury" means that after the elimination of all jurors who can not sit for cause, each side is given four peremptory challenges.

Mr. GARD. Why, in the administration of justice, can you not obtain the same good results by putting aside the struck juries and having the qualification of jurors determined on the trial, have the jurors brought in and take seats in the jury box, and then have them interrogated and challenged, without this preliminary striking out of names?

Mr. EASBY-SMITH. That is done in the criminal court. We do not do that in the circuit courts.

Mr. GARD. Why not do that in all courts?

Mr. EASBY-SMITH. As the matter works out in practice this is the simplest and most expeditious way.

The CHAIRMAN. You have peremptory challenges for cause?

Mr. EASBY-SMITH. You exercise them by striking the names off the list.

Mr. GARD. How many peremptory challenges do you have in first-degree murder cases?

Mr. EASBY-SMITH. There are 20 in first-degree murder cases and 10 in other criminal cases.

The CHAIRMAN. And as many other challenges for cause as you can show?

Mr. EASBY-SMITH. Yes. This delay frequently arises. The jury in a civil suit will retire. That leaves 14 men, provided the entire panel is present. A jury may be out on a civil case one-half hour, an hour, all day, or all night. If counsel in the next following case exercises the right to the peremptory challenges, so that we need a long panel, it is utterly impossible to empanel a jury until the 12 men who are out on the preceeding case have returned their verdict.

Mr. IGOE. Have you no provision for an exchange of juries?

Mr. EASBY-SMITH. We have not.

Mr. WILLIAMS. Are your civil juries procured by the struck-jury systems?

Mr. EASBY-SMITH. If that is demanded. In many cases counsel will say, "We do not care for a long panel. Call the first 12 men." In some cases where counsel wants to exercise the right peremptory challenge they insist upon a long panel, which gives them four peremptory challenges, in addition to challenges for cause.

The new system included in this bill provides for an entire new method of drawing the jurors, and provides for a new jury commission.

It provides that instead of the three existing officials, on the new jury commission there will be appointed three disinterested, actual residents of the District of Columbia, who will fill the box and from time to time draw jurors for service, not in Criminal Court No. 1, not in Circuit Court No. 1, but will draw jurors for attendance upon the Supreme Court of the District of Columbia at large, and the amendment to the bill as suggested provides that the Supreme Court of the District of Columbia, by an appropriate rule, shall assign those jurors to the special terms, reassigning and redistributing them from time to time.

The first result of that will be, that if a jury is out in Circuit Court No. 1, and there are not enough men there qualified to fill the jury box for the next case, they can call from the other circuit courts, or from the criminal courts any jurors in attendance, in order to fill the jury box in that particular case, so that there will be no delay.

Mr. VOLSTEAD. How are the jury commissioners to be appointed?

Mr. EASBY-SMITH. They are to serve for three years, and are not eligible for reappointment until three years have elapsed.

When the jury commission is first appointed, the members of the commission shall serve for one, two, and three years, respectively, and they are to serve, after that for three years and to receive a compensation of $10 a day for the actual time they are in service, not to exceed three days in any one month.

Mr. NELSON. Has it been found that the present jury commissioners are not effective for serving on a jury commission?

Mr. EASBY-SMITH. We have found—and the experience of the bench and bar is unanimous on that point—that for some reason the present law is not being obeyed. The present law provides that no man shall be eligible to sit on a jury until a year after he has served. The law provides that when his name has been drawn and he has served, his name shall not be put back in the box for a year. We find, term after term, the same jurors. It appears that the three commissioners, the collector of taxes of the District of Columbia, the United States marshal, and the clerk of the Supreme Court of the District of Columbia, are so busy with their other duties that apparently they have not the time to devote to the filling of the jury box and to the drawing of the jurors. I do not mean to criticise those gentlemen, but I am stating facts when I say the present law is not being lived up to.

Mr. GARD. You say they have not the time to do that. That should be one of their first duties.

Mr. EASBY-SMITH. They are not doing it.

Mr. NELSON. Do they receive extra compensation for that duty?

Mr. EASBY-SMITH. They receive no compensation for this service.

Mr. NELSON. They are not particularly interested in it?

Mr. EASBY-SMITH. Not at all. Most of them are nonresidents of the District of Columbia who are appointed to local offices, and when their term has expired they are likely to move away.

Mr. DANFORTH. Why is not one commissioner just as good as two or three?

Mr. EASBY-SMITH. We felt that we ought to throw around the jury system every possible safeguard, and that we ought to have three men so that they would be a check on one another, and that it would be a bad thing to put in the hands of one man the power of filling the jury box.

The CHAIRMAN. What are the qualifications?

Mr. EASBY-SMITH. The qualifications are simply that they be residents of the District of Columbia, that they be 21 years of age, able to read and write, and understand the English language.

We have in the existing laws, providing for condemnation juries, provisions put in there by Congress providing for greater qualifications for those men than for the average juror, and when we come to the qualifications for those jurors we have left in such things as that they must be freeholders and residents of the District for a certain length of time.

We have provided for a general jury box, and we have provided that at each drawing there shall be not less than 600 names in the box, and we have prescribed in this new provision that the jurors shall have the qualifications that are now provided in the existing law.

We have also provided that for condemnation juries and commissions there shall be a special box containing 100 names, and that each of the persons whose name is in that box shall possess certain qualifications over and above the qualifications of an ordinary juror.

Under the present system of drawing condemnation commissions and jurors there has been a great deal of criticism, and merited criticism, perhaps in this committee and other committees of Congress, by reason of the fact that week after week, month after month, year after year we have the same five men or the same seven men on a jury or a condemnation commission.

Mr. IGOE. Who selects them at the present time?

Mr. EASBY-SMITH. They are selected at the present time by the United States marshal for the District of Columbia. The present law provides that the court shall direct the United States marshal to summon these men.

Mr. IGOE. How do you provide for that in your proposed amendment?

Mr. EASBY-SMITH. We have provided for a special box containing 100 names.

Mr. IGOE. Why should not the court appoint those men?

Mr. EASBY-SMITH. We have provided this. At the present time the court does not do that, except that the court instructs the marshal to summon those men.

Mr. GARD. Why do you not give the court authority to issue a special venire?

Mr. EASBY-SMITH. We should be where we were before. We want, if we can, to provide for this jury commission and to keep a special box filled with 100 names of persons particularly qualified to act as condemnation jurors.

Mr. IGOE. Who determines if they are particularly qualified?

Mr. EASBY-SMITH. The jury commission.

Mr. IGOE. Do they select the 100 names?

Mr. EASBY-SMITH. They must put in the box the names of men who are provided for by the statute.

Mr. IGOE. How long would that list last?

Mr. EASBY-SMITH. They must keep it up from time to time. At every drawing of names from this box there must be 100 names there, so that the men whose names are drawn from the box would not be eligible to serve for another year.

The CHAIRMAN. What would be the objection to having the court appoint these jurors?

Mr. EASBY-SMITH. If we have this box containing the names of 100 men to be drawn by lot, it removes the personal element. I do not say that the power has been abused, but it has been seriously criticized in Congress, and it has been said that certain judges have appointed certain individuals here in Washington at large compensation over and over again to sit as condemnation jurors.

Mr. GARD. Would not this increase the personal element if it were known that 100 men, specially qualified jurors, were to sit in condemnation cases? Would not that draw attention to that proposition and cause it to increase the personal element?

Mr. EASBY-SMITH. Who is to know whose name is in the box? Only the jury commissioners know.

Mr. IGOE. Do you not have a list of jurors, a book, showing the names of the jurors in that box?

Mr. EASBY-SMITH. No, sir; not at present. We provide in this new system that there shall be such a list maintained, but that it shall be secret and only available to the jury commissioners.

Mr. IGOE. Do you not afford an opportunity for people to claim exemption?

Mr. EASBY-SMITH. They can claim that when they are summoned.

Mr. IGOE. Make them come into court?

Mr. EASBY-SMITH. Make them come into court. We have a great deal of trouble here in getting jurors, and for this reason. Of course, as you know, a majority of the more intelligent population here are employed in the Government service, either by the United States Government or by the District Government.

Now, the law, as it now exists—and it ought to continue to exist—disqualifies all those persons from serving as jurors in any court.

Mr. IGOE. I do not see why you do not provide that they shall claim their exemption at certain times, and then they shall be excused. It would relieve all the men who ought to be relieved by exemption.

Mr. EASBY-SMITH. Practically no exemptions are claimed other than that a man may say he served at the last term of the court.

Mr. IGOE. The jury commissioners ought to be held responsible for that.

Mr. EASBY-SMITH. They ought to be at the present time, but they are not. The law forbids them from putting the same names back in the box, but they do it.

The CHAIRMAN. Why do they do it? Is there any charge of corruption?

Mr. EASBY-SMITH. There is no charge of corruption.

The CHAIRMAN. It is an unfortunate practice, and I am glad you want to eradicate it. It leaves the opportunity open for criticism.

Mr. VOLSTEAD. I believe there was a great deal of criticism over jurors called to testify as to the value of certain lots here, and that made this difficult.

Mr. EASBY-SMITH. It made that very difficult. They are not called to testify; they are called to sit and pass upon the value of all these properties, and as experience has shown, they are used over and over again.

As far as claiming exemption is concerned, if the men whose names are put in the box are qualified, the only exemption was in the case of a man who was over 65 years of age or who had served within the time prescribed by law, or that he is ill or deaf.

Mr. IGOE. That can not be determined in advance?

Mr. EASBY-SMITH. No.

The CHAIRMAN. Does the court ever appoint jurors?

Mr. EASBY-SMITH. In many of the condemnation cases, and in cases where the Government is concerned; in every condemnation of streets and alleys, and, under special acts of Congress taking large pieces of land—for example, the site of the Congressional Library—most of those acts provide that the commissioners shall be appointed by the court, and the commissioners who sit in the valuation of that property are appointed by the court, but even in a great many of those cases there has been a great deal of criticism with regard to the appointment of those same men.

Mr. VOLSTEAD. Is it not better not to have the court make the appointments?

Mr. DANFORTH. You spoke of special jurors in property cases. There would be commissioners in some cases and jurors in others, would there not?

Mr. EASBY-SMITH. Yes.

Mr. DANFORTH. Where you have jurors do you have one, two, or three commissioners acting with them?

Mr. EASBY-SMITH. There are either three commissioners sitting to hear the testimony and to pass on the values or five jurors who go out and view the property, or seven jurors. It depends upon the sort of condemnation.

Mr. DANFORTH. You never have commissioners and jurors?

Mr. EASBY-SMITH. They never do sit together.

Mr. DANFORTH. Who presides over the juries?

Mr. EASBY-SMITH. One of their number presides, and they make up their report, or their findings, and report their findings to the justice who is presiding in Criminal Court No. 2. He receives their report on the valuation of the property and hears any legal objections that may be made by parties who are interested.

Mr. DANFORTH. Do those jurors get the same per diem and allowances as the commissioners?

Mr. EASBY-SMITH. No; the commissioners are paid more than the jurors—$5 a day, I believe. In many special acts their compensation is specifically fixed at a certain sum per day. I think the jurors get $2.50 a day for each day they serve.

Mr. COVINGTON. I wish to state with reference to this matter, Mr. Chairman, that all the members of the court believe that, considering this jurisdiction and the many situations that exist here, the

members of the court ought not themselves to be charged with the duty of selecting the jurors. Without going into a lengthy statement of the many reasons that have already suggested themselves to the minds of the members of the court, the members of the court believe they ought not to be put in the situation of having that direct burden resting upon them if adequate machinery can be constructed to do it otherwise.

There is one other suggestion I would like to refer to. Without in the slightest degree reflecting on the members of the present jury commission, we all do know, as a matter of common experience, that men move in the performance of extra duties along the lines of least resistance. The United States marshal naturally obtains the knowledge of the names of a limited number of men in the ordinary way, through the work he does in the marshal's office. The collector of taxes has the same knowledge of names of men through the ordinary processes existing in his office without any knowledge at all of the personal qualifications of those men. When they have available the actual names of individuals sufficient in quantity to make up the number to be put into the jury box it is the natural thing for those men, getting no additional compensation, performing this as an incidental duty, to use the names available without making an inquiry as to the peculiar qualifications of the men, and the result is as has been stated.

Mr. IGOE. Is there in the law now, or there proposed in this law, any authority to make a canvass of the city, as they do in my city of St. Louis, on the part of the jury commissioners, who appoint deputies to canvass the city in order to ascertain the names and residents and their qualifications?

Mr. COVINGTON. Mr. Easby-Smith can explain that, and he can also explain that by the new practice here under which we draw the jury commissioners to do this work that is not at all necessary. Three men would be adequate to obtain all the desirable information with respect to the personnel of the group whose names go into the box.

The CHAIRMAN. Is there an appeal from the assessment made by the condemnation juries or the commissions to the court?

Mr. EASBY-SMITH. There is an appeal to the supreme court and the court of appeals, and there may be an appeal to another jury, but that other jury is selected in the same manner.

The CHAIRMAN. Is there no appeal to the court in regard to the matter of valuation?

Mr. EASBY-SMITH. None whatever. It is final.

Mr. TOBRINER. The only manner in which a reassessment or a new jury can be obtained is on exceptions to the findings which must be sustained by the court before a new jury is impaneled.

Mr. IGOE. The court will hear testimony with regard to the exceptions, will it not?

Mr. TOBRINER. Yes.

The CHAIRMAN. Whenever a condemnation jury or a condemnation commission fixes the valuation, that is final. There is no appeal from that?

Mr. EASBY-SMITH. Except that in some cases the court has set side the findings as too large. I do not think they have ever said the finding was too small.

The CHAIRMAN. If it is satisfactory to all the gentlemen present, we will take a recess at this point, and reassemble at quarter past 2 o'clock this afternoon.

(Thereupon at 12.45 o'clock p. m. the committee took a recess until 2.15 p. m.)

AFTER RECESS.

The committee reassembled at 2.15 o'clock p. m.

The CHAIRMAN. The committee will come to order. When we suspended for recess before noon we were considering section 198 with reference to jury commission. I believe Mr. Easby-Smith was addressing the committee.

Mr. EASBY-SMITH. Mr. Chairman and gentlemen, if the committee please there is only one other matter of a general nature I want to call to the attention of the committee before taking up the sections in detail, and that is the following:

As I have heretofore stated, at the present time the terms of service of petit jurors are not coincident. Some of them are for two months, some of them for three months——

The CHAIRMAN (interposing). Why is that?

Mr. EASBY-SMITH. For the reason as stated this morning, the code was not gotten up at one and the same time. It is a sort of hodge-podge, the existing laws were gotten up together, one added to the other from time to time. Another reason for it is this, that the jury laws have provided for the jurors to be drawn for certain terms of the civil or criminal courts.

Mr. GARD. I presume the term of service is largely within the discretion of the court anyhow, is it not?

Mr. EASBY-SMITH. It is not under the present law. We have changed that in this bill so as to make the term of service of petit jurors one month. One reason for limiting it to a short service, in addition to having it consistent, is that we are very limited here in the persons from whom we may select jurors; all Government and District of Columbia employees, all physicians, ministers of the gospel, lawyers, and some of other callings, being exempt from jury service, therefore we have to call on simply the local business men, and, of course, mechanics and laborers in the District, and the class of persons from whom we can draw jurors is not more than 50 per cent as large as the class from which jurors may be drawn in an ordinary community. It is a great hardship on business men to have to serve two or three months at a time on juries.

The CHAIRMAN. Do you find the business men trying to get out of jury service?

Mr. EASBY-SMITH. We find them trying to avoid jury service all of the time.

The CHAIRMAN. Here as well as everywhere else?

Mr. EASBY-SMITH. Yes, sir.

The CHAIRMAN. They avoid the jury service and then go out and claim that a jury has done them an injustice?

Mr. EASBY-SMITH. But the principal complaint, and the one I have thought of over and over again, is that the term of service is so long, sometimes two or threee months, that they can not possibly afford to neglect their business for that length of time.

Mr. GARD. Can they not be excused if any urgent situation arises?

Mr. EASBY-SMITH. They may be for a few days at a time, but the moment you begin to excuse one or more from the panel—it may happen that one or more is sick—then you have got your number of jurors reduced to a number with which you can not do business in the courts. Also there is a disinclination to serve, which we think would not be so great if the term of service were shorter, and after canvassing the situation we felt very strongly that we could get a better class of jurors and that they would probably serve more readily if they knew their term of service was shorter.

The CHAIRMAN. How many jurors will you have now serving each month?

Mr. EASBY-SMITH. At the present time we have four petit juries of 26 men, which is 104 men. Of course the law provides for special juries to be drawn, just from case to case, to try will cases and to try lunacy cases.

The CHAIRMAN. Are those special jurors drawn by panels or from the box?

Mr. EASBY-SMITH. They are drawn from the box. It was our idea, and we have left it to the Supreme Court of the District of Columbia to designate the number of jurors to be drawn for service in the Supreme Court at large, not to be drawn for service in any particular, special term, and we feel that if the court would draw practically the same number that are now serving, or perhaps a few more, and have this right of assignment and reassignment and transfer from one special term to another, as occasion required——

The CHAIRMAN (interposing). It seems to me that you could get along with even a less number?

Mr. EASBY-SMITH. Probably. That would have to be determined by experience.

Mr. GARD. Do you have any particular terms of court?

Mr. EASBY-SMITH. Oh, yes.

Mr. GARD. How many?

Mr. EASBY-SMITH. We have three terms of the criminal court and three terms of the circuit court; then we have 12 terms a year of the equity court, and there are none of them coincident. The criminal terms begin and run for a certain time; then the circuit court terms begin in the district court, and the terms are all different.

Mr. GARD. How long does the criminal term continue?

Mr. EASBY-SMITH. The October term lasts October, November, and December, according to my recollection. As a matter of fact, except for the summer months, the criminal courts are continually trying criminal cases. There is no lapse between one term and another.

Mr. GARD. Might there not be certain cases that will take longer than 30 days to complete the trial of?

Mr. EASBY-SMITH. That is provided for—that jurors, if impaneled in a case, shall continue to serve on that case until the determination of the case.

I think I have given you a general outline—at least, I have attempted to do so—of the present system and of what we want to change.

The CHAIRMAN. I think you have improved you present system considerably.

Mr. EASBY-SMITH. If you will turn back to page 3, I thought we might take up the sections in consecutive order that this new jury system affects.

On page 3, section 65, at the bottom of the right-hand column, you will see we have stricken out of section 65 the words—

May provide by rule of court for the transfer from time to time, as the occasion shall require, of a jury summoned to any one special term to any other special term having cognizance of jury trials, and for the filling of vacancies arising in such transferred jury; may establish rules of practice in said special terms not inconsistent with the laws of the United States.

We have stricken that out because it is provided for later in the new system.

Then, if you will turn to section 115a, page 6, at the bottom of the second column—

All writs de lunatico inquirendo shall issue from said equity court, and a justice holding said court shall preside at all inquisitions of lunacy—

And we have inserted—

and may impanel a jury from among the petit jurors in attendance in the Supreme Court of the District of Columbia.

That to take the place of the drawing of a special jury.

Then, in section 140, at pages 9 and 10, in the new proposed law, on page 9—this relates to the trial of will contests—beginning at line 9:

If they are to be tried by a jury, they shall be triable in said probate court—

And insert:

by petit jurors drawn for service in the Supreme Court of the District of Columbia.

Turning over to page 10, we have stricken out on that page the existing provision for the drawing of a special jury, beginning at line 5:

Before the time of trial the justice holding said court shall direct 24 jurors to be drawn for service in said court, having the qualifications prescribed by law, in the manner provided by law for the drawing of jurors to serve in the circuit court.

That is stricken out because the new system takes the place of it.

Coming to section 198, at page 11, there we take up the entire new system. If the committee wishes, I will read and we will comment on it as I go along. Shall I follow that procedure?

The CHAIRMAN. You need not read it unless you want to. You may state the substance of it.

Mr. EASBY-SMITH. The substance is the appointment of a commission of three persons, who shall be citizens of the United States and actual residents of the District of Columbia; they shall be freeholders in the District of Columbia, not engaged in the practice of the law; and such commissioners shall be appointed by the Supreme Court of the District of Columbia in general term, and shall serve for a term of three years.

The CHAIRMAN. Is not that requirement, that they shall be a freeholder, unnecessary in a juror?

Mr. EASBY-SMITH. That is for the commissioners, not for jurors.

Mr. CARAWAY. What is your idea in making the same commission serve three years?

Mr. EASBY-SMITH. We have provided this jury commission. The first appointees shall serve, respectively, one, two, and three years.

The CHAIRMAN. A new commissioner every year?

Mr. EASBY-SMITH. Yes, sir; a new commissioner each year. It is a continuing board, and, at least, the ones first appointed will serve one, two, and three years; then as they retire their places will be filled, and eventually every man appointed will serve three years and then be ineligible for reappointment within three years of the date of the expiration of his term of service.

Mr. CARAWAY. What advantage do you think you are going to gain by this suggested extreme length of service for jury commissioners? I should be inclined to imagine that a shorter term would be better.

Mr. EASBY-SMITH. It is not one body sitting for three years and then all going out at once, as it is now, and as it seemed to us that as these men stayed in office more than one year and up to three years, that they would acquire experience which would be valuable, and that they would be more valuable as jury commissioners if they did serve three years, instead of having a complete change every year, for example.

The CHAIRMAN. Than it would be under the present system, which is either four years or perpetually?

Mr. EASBY-SMITH. It is either four years or perpetually, and we have had some United States marshals who have served as long as 12 years; we had a clerk of the court, he served for nearly 30 years; and we had a collector of taxes who normally would serve four years, and he sometimes serves a good deal over four years.

Mr. VOLSTEAD. How often do they change in the Federal courts?

Mr. EASBY-SMITH. In the Federal courts the jury commission generally is composed of the clerk of the court and one jury commissioner appointed by the court, with the further provision that they must be of diverse political parties. I have not had occasion to refer to it recently, and I do not just now recall the term of service, but my personal experience has been, having known some of them, that in the case of the Federal courts generally, I have known some instances of men serving as jury commissioners 20 or 30 years. I remember distinctly one man in Oregon 80 years old at the time I refer to, having been a jury commissioner for 30 years. I do not know whether he continued in that office longer or not.

The CHAIRMAN. I think the term should be contemporaneous with the judges' terms, unless they were dismissed.

Mr. EASBY-SMITH. We go on to provide that they shall place names in the jury box and shall have custody and control of the jury box. The compensation of said jury commissioners shall be $10 a day for each day or fraction of a day when they are actually engaged in the performance of their duties, not to exceed three days in any one month, which shall be paid by the United States marshal out of the appropriation for pay of bailiffs. That is the appropriation from which jury commissioners in Federal courts generally are paid.

Since this draft was made we have canvassed the situation, and the committee has come to the unanimous conclusion, and the court agrees with us, and the chief justice has stated that we may state for him that they believe this limitation to three days a month is not enough: that it ought to be increased to five days a month, because, as you will see later, they not only have to draw the grand jurors and petit jurors,

but these condemnation jurors and commissioners in the two boxes, and keep the number of names in the jury boxes up to 600, and shall keep an accurate record, in alphabetical form, of all names, as this law requires; therefore we have concluded that three days a month will hardly be enough, and we felt that this ought to be increased to not to exceed five days a month. That amendment would be in line 12 on page 12.

Mr. DANFORTH. Is it not contemplated that these jury commissioners shall make out new lists?

Mr. EASBY-SMITH. Continually.

Mr. DANFORTH. That when these three men take office they shall extend and institute a new system?

Mr. EASBY-SMITH. Absolutely.

Mr. DANFORTH. Do you think five days in a month is going to be enough time to get this thing started?

Mr. EASBY-SMITH. Probably not; but their work will lessen after a little while. For instance, it will probably take a considerable time for them to start the system and get their two jury boxes filled, and that work will take more than five days a month; but we felt that these will be honorable positions, and that men in the community will seek them not so much for the $10 a day but because they are places of honor in the community. We felt that they will be willing to perform some extra work that they will not be paid for in the beginning.

The CHAIRMAN. That would make the jury commissioners cost you, at the outside, $1,800?

Mr. EASBY-SMITH. At the outside, $1,800 a year, $6 apiece.

The CHAIRMAN. How will they be paid? Is that expressed in here?

Mr. EASBY-SMITH. They are to be paid by the United States marshall out of the appropriation to pay bailiffs, on the certificate of said commissioners.

We have left in the supreme court the power to dismiss:

The said Supreme Court of the District of Columbia, in general term, shall have power summarily to remove any of said commissioners for absence, inability, or failure to perform his duties as such commissioner, or for any misfeasance or malfeasance, and to appoint another person for the unexpired term. In the event of the illness or other inability or absence from the District of Columbia of any one of said commissioners, the two other commissioners may perform the duties of said jury commission.

Coming now to page 13, section 199, we have simply stricken out the words "the citizens," so that the section reads now:

The said jurors shall be selected, as nearly as may be, from the different parts of the District.

Another section later takes care of their qualifications.

Section 200 is provided, as follows:

SEC. 200. Jury box: The jury commission shall write the names on separate and similar pieces of paper, which they shall so fold or roll that the names can not be seen, and shall place the same in a box to be provided for the purpose.

Section 201 reads as follows:

SEC. 201. The jury commission shall thereupon seal said box and, after thoroughly shaking the same, shall deliver it to the clerk of the Supreme Court of the District of Columbia for safe-keeping; and the same shall not be unsealed or opened except by said jury commission.

Then, the next section, 202, changes the present term of service:

The respective terms of service of petit jurors shall begin on the first Tuesday of October, and shall terminate on the Monday preceding the first Tuesday of the next month thereafter, except when the jury shall be discharged by the court at an earlier day, or when a jury shall be impaneled and it shall happen that no verdict shall have been found before the day appointed by law for the commencement of the next succeeding term, in which case the court shall proceed with the trial by the same jury in every respect as if its term of service had not ended.

That takes care of the question Mr. Gard asked a while ago.

The CHAIRMAN. What is the benefit or advantage in having so many terms?

Mr. EASBY-SMITH. Simply to change the term of service to one month, for the reasons that I have explained. There is the difficulty of obtaining substantial men, who would seek to evade long terms of service, and we have simply made the service a monthly service, instead of as it is now—one, two, or three months.

Mr. CARAWAY. Have you any provision as to whether a man may be drawn for more than one term a year?

Mr. EASBY-SMITH. Yes, sir; we have provided that after a man has served his name shall not go into the box until one year shall elapse. I was explaining this morning that that was one of the abuses, and I want to say I do not mean any reflection on the present commission; but that is one of the abuses at the present time—the names getting back continually, term after term.

Mr. CARAWAY. They become professional jurors, almost?

Mr. EASBY-SMITH. It is a system which is almost sure to create a class of professional jurors.

The CHAIRMAN. Will it affect the terms of court?

Mr. EASBY-SMITH. No, sir; as I have stated, we shall not affect the terms of court. The equity court is once a month, and the circuit and criminal terms are for two and three months, respectively.

The CHAIRMAN. But it is provided in here that if the term of a juror should expire while sitting on a case his term of service shall continue until the case is concluded?

Mr. EASBY-SMITH. Yes; this specifically so provides. I have just read that.

Mr. DANFORTH. Why pick the first Monday preceding the first Tuesday of the next month thereafter?

Mr. EASBY-SMITH. Because at the present time all terms open on Tuesday, the first Monday of the month is the beginning of the term, whether in circuit, criminal, or equity court.

Mr. DANFORTH. They would not take up a case on Monday, would they?

Mr. EASBY-SMITH. Yes; many times cases are started on Monday and may run two or three weeks, and the jury that is in attendance continues in the trial of that case. You see the terms overlap; there is no break in the terms; the courts are running continually.

Coming now to section 203, the term of service of the grand jury, we have not changed that except to add, beginning at the bottom of page 14, at line 24, and continuing on page 15, the following:

The foreman of the grand jury shall be selected by the justice presiding over the special term known as criminal division Numbered One from among the jurors, grand and petit, in attendance upon the Supreme Court of the District of Columbia; and, in the event that said foreman is not selected from

among the twenty-three grand jurors in attendance, but is selected from among the petit jurors, one of said grand jurors shall be excused as such and transferred to the roll of petit jurors, and the term of service of the foreman so selected of the grand jury shall be concurrent with the term of service of the grand jury.

Mr. VOLSTEAD. Can you select a foreman of the grand jury from the petit jury?

Mr. EASBY-SMITH. Yes, sir. The reason for that is this: At the present time there is no law covering the selecting of the foreman, but it is simply an old practice that when 23 men are summoned for a grand jury the justice presiding in criminal court No. 1 has selected one of those 23 as foreman. We discussed this matter very fully with the court and the consensus of opinion seemed to be that it frequently happens that among the 23 men selected as grand jurors there is not among the whole 23 a man who is really available as a first-class foreman. So we devised this plan, that upon the drawing of the whole array of petit and grand jurors the justice presiding in this particular court shall have the power to select from the whole array, which will give him 120 or 130 men from whom to select—shall select the foreman of the grand jury from among all those who have been drawn from the box, and the further provision that if he should take one who was drawn as a petit juror he shall be transferred, and one of the men drawn as grand juror shall thereupon be transferred and become one of the petit jurors.

Mr. GARD. What are the duties of the foreman of the grand jury in the District of Columbia that an ordinary man can not serve?

Mr. EASBY-SMITH. None, except presiding over sessions of the grand jury and expediting business.

Mr. GARD. Presiding and signing bills?

Mr. EASBY-SMITH. That is all.

Mr. GARD. Like very other grand jury, it is absolutely conducted by the prosecuting attorney, is it not?

Mr. EASBY-SMITH. That is not true here. I was assistant district attorney here some years ago for several years, and my experience was that in not more than 25 per cent of the cases did the district attorney or one of his assistants appear before the grand jury. The foreman of the grand jury, unless it is an important and involved case, requiring the advice and assistance of the district attorney, conducts the examination of the witnesses.

Mr. VOLSTEAD. Does the foreman swear the witnesses?

Mr. EASBY-SMITH. I am not sure now. I believe the secretary—no; the foreman swears them.

Mr. GARD. Do you not get better results by having your prosecuting officer question the witnesses before the grand jury?

Mr. EASBY-SMITH. That is done only in important cases, and I do not know why it is not done. It probably is because we have not sufficient force here to do it. As a matter of fact, the force in the United States attorney's office at the present time is just about the same as it was 40 years ago, and they are now doing four times the business; and that is also true in most of our institutions. Our judges here—six judges—hold the Supreme Court of the District of Columbia, and are transacting business to-day four times in volume what it was when the court was created and six judges were appointed 50 years ago.

Mr. VOLSTEAD. Are you sure it is legal to take a petit juror and make him a part of the grand jury?

Mr. EASBY-SMITH. I think by this language——

Mr. VOLSTEAD (interposing). I mean this: If you have selected the grand jury, can you take anyone and put them on that grand jury, in among those grand jurors, and make him one of the grand jurors by action of the court?

Mr. EASBY-SMITH. Only by this specific authority—by this law—if it becomes a law.

Mr. VOLSTEAD. You see, that would be a selection by the court itself. The question is whether grand jurors, under the old common law, were selected by lot. Here you are allowing the judge to select him arbitrarily. The grand jury is an old, ancient institution, and governed by some pretty rigid rules, and I question whether you can do that.

Mr. COVINGTON. If the committee will permit me, and if Mr. Easby-Smith will yield for just one moment, I should like to make a statement, as follows:

The history of the grand jury involves very largely the history of one of the most ancient institutions of the common law, and, as we all know, a great deal of the evolution of the common law is shrouded in both mystery and obscurity. Very few lawyers know, very few legal historians do know, as a matter of fact, precisely how much of legal sanctity there is around the various customs in common-law courts. I frankly confess that just how the custom came of selecting the foreman of the grand jury I do not know, but I call the attention of the committee to a fact that has led me to the belief in its legality, in the legality of this provision, and that is this:

In the State of Maryland, from which a number of these gentlemen happen to come, because of the contiguousness of the State to the District of Columbia, this system, which in effect would be what you have questioned, has been in existence time beyond memory. The courts have drafted in the rural district 48 men to serve as jurors, and the unbroken practice has been that those 48 have been brought in there, and, before a single juror has been drawn, it has been the practice to make a foreman; the court has exercised what it has been believed to be, and what I am constrained to believe must be, a constitutional power, in saying to the clerk of the court: "Mr. Clerk, withdraw the name of John Smith from the box and draw 22 names," those 22 thereafter to constitute the grand jury.

I only cite that to indicate, with no pretense of knowledge, which I presume none of us could have, the limitations that would surround——

Mr. GARD (interposing). In that illustration which you give, the list of 22 was drawn from the 48 who originally responded, and you withdraw the name of one man and then draw 22 following, and that constitutes the grand jury?

Judge COVINGTON. Yes, sir.

Mr. GARD. The distinction, as I see it here, Mr. Justice, is that this law provides for the calling of a petit jury and also of a grand jury. In other words, the law itself distinguishes, and the point remains. Now, you take a man from the petit jury and make him foreman of the grand jury, and you take a man from the grand jury and put him on the petit jury.

Judge COVINGTON. Mr. Gard, I really think that while that is a distinction in fact, quite a pronounced distinction in fact, that it is not a distinction in law that would affect the validity, for after all the jury is not constituted as a grand jury until it has 23 integral parts, 23 persons, and that grand jury has not been completed until from the whole body of jurors, grand and petit, already drawn, there is selected by the court the one man who is to constitute the foreman.

Mr. GARD. It is not complete until it is formed and is fully constituted.

Judge COVINGTON. I am constrained to believe that it is not a legal grand jury until it has 23 men, with the foreman included in its personnel.

The CHAIRMAN. Could we not pass a law making a grand jury 13?

Judge COVINGTON. Unquestionably. And I venture this assertion, I think Mr. Volstead comes from a State in which, in the exercise of the plenary power of the State to uphold by the supreme court, the grand jury has been abolished altogether, has it not? In Nebraska and California it has, I know.

Mr. NELSON. And in Wisconsin it has.

Mr. VOLSTEAD. But that is abolished by constitutional provision. It is not actually abolished in Wisconsin, but the district attorney, as he is called in that State, may file an information, provided the grand jury is not called.

Judge COVINGTON. But it all gets back to the same constitutional proposition, that the legislature may, in any way it pleases, reorganize the structure of the grand inquest of the particular territorial body within which it is performing its functions.

Mr. CARAWAY. In my State 16 men constitute the jury, and the supreme court has decided that the court may discard them and summon another altogether.

Judge COVINGTON. There is really no purpose in this except one, if I may state it very briefly. I think all these gentlemen will agree that, contrary to the statement made heretofore, the district attorney's office ought never to have a grand jury whose foreman is a weak, easy-going man that will permit the district attorney to usurp the functions of the grand inquest, if there is to be one. It is, theoretically, an arm of the court, and it ought to be, if it is to continue its existence, an arm of the court; and it ought to have, in the way in which each local jurisdiction can properly provide it, that sort of a directing head, that sort of a presiding officer, that in effect can make it an independent arm of the court, not subservient even to the prosecuting attorney's office. I feel, with my common-law knowledge, that if it is to be really the deliberate judgment of 23 men; if it is not to be merely the cash-register judgment, if you please, of the man acting at the dictates of the prosecuting attorney's office—that is not the function of the grand jury of the old times, and ought not to be to-day. If the prosecuting attorney is to be charged with that duty, he ought to do it in the open and ought to be compelled, as is in some States, to walk into court and under the sanctity of his oath file his information; but he ought not, through an assistant, unknown perhaps in name, to have his will worked through the grand inquest and at the same time have its existence preserved. One of the two ought to exist.

Mr. VOLSTEAD. The reason I made the suggestion, I recalled a case—one of the old English cases—in which the judge selected a grand jury, and the indictment was satisfied.

The CHAIRMAN. Mr. Volstead, do you think we could authorize the presiding judge in criminal division No. 1 to select a grand jury?

Mr. VOLSTEAD. I do not believe so.

The CHAIRMAN. Why? Does the Constitution prohibit?

Mr. VOLSTEAD. I am inclined to think that the grand jury is an institution to be selected largely by lot under the old practice. I am not saying this is not sufficient, because here is a selection by lot in a way, and whether this would comply with the law or not I am not seriously contending. I thought I would submit it to you gentlemen who have been studying this phase of it and suggest to you why I think it is an innovation.

The CHAIRMAN. It may be a change from practice established by statute, but I think the grand jury is purely a statutory provision; 16 or 23 may be drawn by lot or by the justice presiding.

Mr. EASBY-SMITH. We felt we had retained the drawing by lot, because it does not permit the justice to go outside of those drawn by the lot for jurors. It simply gives him a little wider scope, so that he may select one of the men drawn by lot from the box.

Mr. VOLSTEAD. With some executive ability?

Mr. EASBY-SMITH. Yes, sir.

Mr. CARAWAY. What is the length of term of a grand juror?

Mr. EASBY-SMITH. That is coincident with the criminal terms, which are three months, and I believe the grand jury, which is selected in June, holds over until October.

Mr. CARAWAY. Do you not think that is a rather long term of service?

Mr. EASBY-SMITH. You see they do not have continuous service from day to day. They do not sit all the time, and the days they do sit, as a rule, they only sit two or three hours, so they can arrange their time to suit their own convenience.

The CHAIRMAN. They get paid for the days they serve?

Mr. EASBY-SMITH. They get pay for the days they serve only.

The CHAIRMAN. Do you think it is better to make their service——

Mr. EASBY-SMITH (interposing). Yes; leave it just as it is, three months, and not change it to 30 days.

The CHAIRMAN. You may proceed now.

Mr. EASBY-SMITH. In section 204, page 15, the committee will observe that under the original section it was provided that the clerk should break the seal of the jury box and draw therefrom the names of 26 persons to serve as jurors in each of the circuit courts, and of 26 other persons to serve as petit jurors in each of the criminal courts. We have changed that so as to provide that the seal of the box shall be broken by the jury commissioners, who shall proceed to draw therefrom by lot and without previous examination, the names of such number of persons as the general term of the Supreme Court of the District of Columbia may from time to time direct.

Mr. CARAWAY. The three commissioners to break the seal?

Mr. EASBY-SMITH. The three men, the jury commission, to do that, and draw by lot the number of men which the supreme court shall designate.

Mr. CARAWAY. Heretofore the clerk did it?

Mr. EASBY-SMITH. The clerk did it heretofore.

Mr. CARAWAY. He drew just by lot?

Mr. EASBY-SMITH. He drew by lot, but the substantial change here is that instead of drawing 26, four panels of 26 men for each of these respective terms, there shall be a number, and we can conceive it would be four times 26, and the court can learn by experience about how many jurors would be necessary—a number drawn for service at large, to be assigned by the court around among the various special terms, in order to avoid the delay I have explained heretofore. That is the substantial change, that the commission itself, instead of the clerk, shall draw these names by lot.

Mr. CARAWAY. They do not select a jury then for the criminal court in the civil division?

Mr. EASBY-SMITH. No; they draw them all at large.

Mr. CARAWAY. They are selected by the court and distributed?

Mr. EASBY-SMITH. Exactly.

Mr. NELSON. You have not a set of jurors for civil work and a separate set for criminal work?

Mr. EASBY-SMITH. No; we will say we have 120 men there who will be assigned by the court by rule, an elastic rule, which may be changed by daily order from time to time around among the special terms needing jurors. For example, this general panel will provide not only for the circuit and criminal courts, but also for trial of will cases, trial of lunacy cases, etc.

Mr. CARAWAY. Do you think there is no advantage in having selected jurors, especially for your criminal and civil divisions? Perhaps a man would be a good juror in a criminal court and a poor one in a civil one, and vice versa. You do not think there would be any advantage in making the selection in that way?

Mr. EASBY-SMITH. We could not select them that way by lot with a view to their character as to their fitness either for civil or criminal courts.

Mr. CARAWAY. The commission could put them in with some view to their fitness, could it not?

Mr. EASBY-SMITH. But they are all drawn from the same box. Under the present system there would be no way of discrimination, and under no system ought there be any way of discrimination. We have attempted to abolish discretion on the part of the jury commission, to destroy the possibility of their picking jurors for this, that, or the other reason.

The CHAIRMAN. Who presides regularly over criminal division No. 1?

Mr. EASBY-SMITH. Any justice who may be assigned. The six judges, sitting in general term from year to year, assign the justices who are to preside in the various courts. There is usually a change the 1st of October of each year; that is not invariable, but that is the general rule.

The CHAIRMAN. The same justice does not preside all the time?

Mr. EASBY-SMITH. They rotate around between the criminal, circuit, and equity courts.

Mr. CARAWAY. Under your practice here can a defendant, by proper process, be tried before one judge and refuse to be tried before another?

Mr. EASBY-SMITH. No, sir; there is no change of venue. There is no such thing as change of venue, and there is no such thing actually as disqualifying a judge or swearing him off the bench. Within my own experience I have known of a few cases, which have arisen in which it was called to the attention of the judge that the defendant felt he was biased and prejudiced, and could not try him fairly, and the invariable rule, as I know it, except in one case, has been for the court to say, "I would not hear this cause; it must go to the other court, to the other judge." Objection of that sort has been very rare, as I have known it.

The CHAIRMAN. This statute applies to the United States?

Mr. EASBY-SMITH. Yes, sir.

The CHAIRMAN. It does not apply to this District at all?

Mr. EASBY-SMITH. You mean the disqualification of a judge?

The CHAIRMAN. Yes.

Mr. EASBY-SMITH. If a judge is disqualified by statutory reasons from presiding the case would have to go to another judge.

Mr. CARAWAY. Prejudice then does not disqualify?

Mr. EASBY-SMITH. Not necessarily.

Mr. IGOE. Would you consider that matter might be taken care of under authority, under this new law?

Mr. EASBY-SMITH. Undoubtedly; it is merely a matter of procedure.

Turning to the next page, 16—and I am simply taking up the more salient points—on page 16, that paragraph provides that the distribution, assignment, reassignment, and attendance of said petit jurors among the special terms of the Supreme Court of the District of Columbia, shall be in accordance with rules to be prescribed by said court. That will give the court complete power to distribute this number of men drawn at large as their services may be needed.

Mr. CARAWAY. Let me ask you this question: Does the judge have the power to dismiss any man from jury service if he decides that his services are not satisfactory?

Mr. EASBY-SMITH. Yes, sir; he has that now. I do not think there is any statutory authority necessary in that case. I know that right has been exercised from time to time. They may excuse for cause, and may dismiss for misconduct.

Mr. CARAWAY. Suppose it does not amount to misconduct; suppose a judge decides a man is temperamentally unfit for service?

Mr. EASBY-SMITH. I have known that right to be exercised repeatedly, and it has never been questioned here, although I think there is no statutory authority for it. That is not covered here, because I say my opinion is that the court has inherent power to do that, because the court is the judge of the qualifications of a juror.

The remainder of page 16 simply applies to the drawing of jurors in the police court and in the juvenile court; it simply makes this system apply to those courts, already existing and having jury trials.

Mr. GARD. You will have a new juvenile court law if it is passed by the House.

Mr. EASBY-SMITH. If that passes it will be in accordance both with the existing law and with this new law, if passed.

Mr. GARD. It will require a change in the police section?

Mr. EASBY-SMITH. Yes, sir.

Mr. NELSON. Who supplies the jurors for the police court?

Mr. EASBY-SMITH. The clerk of the Supreme Court, and certifies them to the clerk of the police court; they are drawn out of the same box, and we provide for the same thing, except they are to be drawn by the jury commission.

Mr. GARD. What trials do you have in the police court?

Mr. EASBY-SMITH. They have jury trials there. A man is entitled to a jury trial for any offense which may result in confinement or in the imposition of a fine of more than $50. Perhaps ninety-nine out of one hundred cases in the police court are tried without a jury, but if the court may impose the punishment of imprisonment or more than $50 fine they have the right to demand a jury trial.

Mr. NELSON. On that point, I have been told, I do not know how true it is, that many would rather accept a fine than ask for a jury trial, because of delay, confinement, etc.

Mr. EASBY-SMITH. I think that is very rarely true, because most of these cases are petty cases and there are very few men confined in jail awaiting trial in the police court. They are usually admitted to enlargement on very small collateral, or very small bail. There are jury trials in police court every month, I should say at least five days out of each month, but not more than one out of a hundred cases go to a jury.

Mr. NELSON. In many cases this expedites matters?

Mr. EASBY-SMITH. I do not think it will have any effect whatever. It simply conforms to the new plan of drawing jurors.

Sections 205, 206, and 207 simply govern the method of drawing, filling the box, and drawing the jury by the commission rather than the clerk.

Section 207 provides that it shall always contain not less than 600 names.

Mr. NELSON. How do you expect the commissioners to get those names? Out my way we have supervisors from various wards and townships who hand in names. What would be the system in the District of Columbia?

Mr. EASBY-SMITH. We expect here they would get them, as I judge they are gotten somewhat now, first, from the assessment books, both the personal tax books and the real estate tax books, and by the commission itself going around and inquiring at large, generally, as to the names and residences and as to their qualifications, etc.

Mr. NELSON. Then you expect the commissioners to serve practically every day of the year, do you not?

Mr. EASBY-SMITH. No, sir.

Mr. GARD. They are supposed to be appointed by men who have knowledge of things generally throughout the community?

Mr. EASBY-SMITH. Exactly. We suppose the court would pick out men because of their peculiar knowledge of local conditions, and, in order to get that, they must have been actual residents of the District of Columbia for at least three years before appointment, and actually domiciled, and must be freeholders. They will simply have to prepare the list in the best way they can. Of course, we do not have any wards or poling places in the District.

The CHAIRMAN. They are to act like county commissioners do?

Mr. EASBY-SMITH. Yes, sir.

Mr. NELSON. You stated in your remarks some time ago that the conditions were peculiar here. What difficulty did you have in mind?

Mr. EASBY-SMITH. I said the conditions here were peculiar so there was difficulty to get suitable jurors to serve any great length of time, because the number of persons from whom jurors may be selected is limited. All Government employees, all District of Columbia employees are not eligible to serve as jurors.

Mr. NELSON. I misunderstood you.

Mr. EASBY-SMITH. So it makes the number of people eligible for jury service very small.

Mr. CARAWAY. Are your jury qualifications, your qualifications for jury service, set out?

Mr. EASBY-SMITH. Yes, sir; I will come to that in a moment.

Mr. VOLSTEAD. Referring to section 209, special venire. That is not a special venire, is it?

Mr. TOBRINER. It is simply common law.

Mr. VOLSTEAD. Set aside so they may be drawn regularly?

Mr. EASBY-SMITH. Yes, sir.

Mr. VOLSTEAD. Supposing that was set aside for some reason or other, what would you do then? You would not have any power to draw a jury until the commissioners could fill the box, could you?

Mr. EASBY-SMITH. Let me read this whole section. It is as follows:

SEC. 209. Special venire: Whenever in any criminal case in the Supreme Court of the District of Columbia it shall become impossible, on account of challenges or excuses, to empanel a trial jury from among the available petit jurors already in attendance on said supreme court and distributed or assigned among the several special terms thereof, the justice presiding at such criminal trial shall order the marshal to summon as many talesmen as may be necessary to complete said jury.

Mr. VOLSTEAD. Suppose you did not have any; that they were all occupied?

Mr. EASBY-SMITH. At the present time, as you understand, there are 26 men only sitting in criminal court No. 1. If there was a murder case those regular men would probably be exhausted in a little while—that is, the majority of them—for one cause or another: some who did not believe in capital punishment or something else. Now, under the law as it exists at present you have immediately got to go out and get a special venire or some talesmen, 50 or 100, to come in and make up the jury. Under the new system, instead of doing that you have a whole body of petit juroys, 100 or 120 in number, all of whom would be exhausted before it would become necessary to go out in the street and bring in talesmen.

Mr. GARD. Do you provide for the drawing of an extra panel in capital cases?

Mr. EASBY-SMITH. No, sir; we do not. We simply provide that in extraordinary cases, and they will only happen rarely, that where all of the 120, or perhaps more, petit jurors in attendance on the courts generally have been exhausted in a capital or other criminal case; that then the presiding justice may order the marshal to go out and summon talesmen from whom the jury may be made up. That law exists at the present, except in capital cases.

Mr. TOBRINER. As you will understand, we have four courts, two circuit and two criminal courts, and if one were engaged in the trial

of a capital case, in the ordinary course of events there would be but one panel in each of the other courts working. The rest of the 26 men in each of the other courts would be disengaged. These could be drawn in criminal cases as talesmen, or first as regular jurors, and if they were then all exhausted, then they would send out for talesmen; but they would always have one-half of the working jurymen available for capital or criminal cases.

Mr. VOLSTEAD. Suppose we should add some more judges, and you were running along trying jury cases everywhere, where could you try them?

Mr. EASBY-SMITH. We would still have two panels in each court. If we had two additional judges, for instance, there would be two panels of jurors available in each of those courts, because the court in the general term would direct the drawing of a sufficient number of jurors to meet the requirements of all courts, whether we had 6, 8, or 10.

Mr. CARAWAY. Some of the States provide that the jury shall consist of 13 men, and one shall not have anything to do with the trial unless one of the 12 become sick or disqualified, and thereby they seek to avoid the necessity of retrial.

Mr. EASBY-SMITH. We do not have that system. We have never felt the need of it. We have always taken the verdict of 12 men, except by consent of parties.

Mr. CARAWAY. In case you have a long trial, extending over weeks, and one of your jurors became sick so he could not serve, you have to retry your cause, would it not obviate that by putting on the thirteenth man?

Mr. EASBY-SMITH. We have had one or two incidents where long trials have been interrupted by the illness of a juror.

Mr. IGOE. After the case is concluded what do you do with the thirteenth man—lock him up separately; after the evidence is in?

Mr. CARAWAY. In one of the dynamite cases the thirteenth man was used after the death of one of the jurors.

Mr. EASBY-SMITH. I want the committee to understand that we have made this one little substantial change here in section 209. That is section 209, as it originally stood, provided for the summoning of talesman, except in a capital case. The practice has been in a capital case, upon the exhaustion of the panel, to go to the jury box and draw a special venire. Now, we have put a capital case on the same footing as all other cases, so on the exhaustion of the whole panel, instead of having a new drawing then and there, the court instructs the marshal to draw talesmen.

Mr. VOLSTEAD. He can go out on the street and draw them under your practice now, can he not?

Mr. EASBY-SMITH. Yes, sir.

Mr. GARD. The usual practice in capital cases is to draw a special jury from the box?

Mr. EASBY-SMITH. Yes, sir; that has been the practice heretofore. There has been heretofore in very rare instances a case where all the hundred or more petit jurors have been exhausted before you get a jury in a capital case, but in that case the only provision will be for the marshal to go out and summon talesmen, but that will be a very rare instance, in our judgment.

The CHAIRMAN. Nearly all the courts in the States have that power.

Mr. EASBY-SMITH. Yes; it is universally exercised.

Section 213 practically includes the old sections 213 and 214, and the punishment for tampering with or committing any fraud in connection with drawing jurors.

Mr. GARD. Is there anything in your bill about the number of jurors requiring concurrence in arriving at a verdict?

Mr. EASBY-SMITH. No, sir. We discussed that to some extent—whether we should attempt to adopt anything of that sort in a civil case; whether nine or a majority of the jurors should return a verdict—but decided that was too radical.

The CHAIRMAN. You decided it was too ancient an institution to tamper with?

Mr. GARD. That is radical.

Mr. EASBY-SMITH. I am not talking about my personal views. I am inclined to favor it. Yet we felt, as a whole, that it would be really a very radical change here.

The CHAIRMAN. There would be a very radical division in this committee should you undertake it. I will say that now.

Mr. EASBY-SMITH. I have tried so many cases that there ought to be a verdict in and had hung juries that I am personally inclined to favor it.

Mr. GARD. I think the experience is found almost generally that nine jurors can return a fair verdict.

Mr. SULLIVAN. I think there is a great deal of public sentiment in civil—not in criminal—matters that 9 or 10 jurors may render a fair verdict.

Mr. EASBY-SMITH. I have known case after case where one juror has held out stubbornly and prevented a verdict in civil cases.

Mr. GARD. But you do not have that in any part of this?

Mr. EASBY-SMITH. We do not have that in this. Personally I should not be averse to having it incorporated, but the committee did not feel that they ought to recommend it at this time.

If you will pass over to page 32, we are coming to the question of condemnation juries. I want to finish this jury system while I am at it. I refer to section 484a, which provides as follows:

SEC. 484a. The jury commission of the District of Columbia shall prepare a special list of persons having the qualifications of jurors, as prescribed by section two hundred and fifteen of this code, and being also freeholders of the District of Columbia, and being also, in the judgment of the jury commission, specially qualified to act as commissioners and jurors in condemnation proceedings. The jury commission shall from time to time as may be necessary write the names contained in said special list on separate and similar pieces of paper, which they shall so fold or roll that the names can not be seen, and shall place the same in a special box to be provided for the purpose, and shall thereupon seal and lock said special box and, after thoroughly shaking the same, shall deliver it to the clerk of the Supreme Court of the District of Columbia for safe-keeping; but the same shall not be unsealed or opened except by said jury commission. From time to time, as ordered by the Supreme Court of the District of Columbia, or one of the justices thereof holding a special term for the trial of condemnation proceedings, the jury commission shall publicly break the seal of said special box and proceed to draw therefrom by lot and without previous examination the names of such number of persons as the said court may from time to time direct to serve as commissioners or jurors in condemnation proceedings and certify the names so drawn to the clerk of said court. At the time of each drawing of condemnation commissioners or jurors from

said special box there shall be in said special box the names of not less than one hundred persons possessing the qualifications hereinbefore prescribed. Except as in this section specially provided, sections one hundred and ninety-eight to two hundred and seventeen, inclusive, of this code, so far as the same may be applicable, shall govern the qualifications of said commissioners and jurors in condemnation cases and the duties and conduct of said jury commissioners under this section. No person shall be eligible to serve as a condemnation commissioner or juror who has served as such commissioner or juror within one year.

We have taken that language verbatim from the acts of Congress covering qualifications for these condemnation juries and commissions.

Mr. CARAWAY. What is the necessity of that? Is that in order to get a lot of real estate men on a condemnation hearing?

Mr. EASBY-SMITH. No, sir; just the opposite. Our purpose is to eliminate, if possible, and to remove——

Mr. CARAWAY (interposing). I found, in going through some of those things a year or two ago, that one man served on about 48 of them.

Mr. EASBY-SMITH. That is what we want to eliminate.

Mr. CARAWAY. You are preparing to select a special list for that very service?

Mr. EASBY-SMITH. Yes, sir; and also providing that when he serves once he shall not be eligible to serve for another year. As I explained this morning, it has been a practice here, under present law, for the marshal to be permitted to go out and summon jurors, five men in the condemnation cases, or in some cases seven men. The practice has been to put the same men on the same commissions and juries over and over again.

In the present law—and we have not changed the law any more than we could avoid—the present law prescribes the qualifications for those men; that they shall be freeholders, that they shall be specially qualified to act as commissioners and jurors in condemnation proceedings, etc. We provide that instead of the marshal having the power to go out on the direction of the court and pick out any five or seven men he chooses, that this jury commission shall provide a special box, which shall contain not less than 100 names of men having these qualifications, and we go on to provide that when a case comes on to be tried, instead of the marshal going out and picking up his friends, perhaps, or men it is easy to get hold of——

Mr. CARAWAY (interposing). Or men sitting there for that very purpose, perhaps?

Mr. EASBY-SMITH. Yes; the jury commission picks these men out of the box, and they are the jury.

Mr. NELSON. What is the necessity of their being a freeholder as one of their qualifications?

Mr. EASBY-SMITH. Congress has adopted that qualification—if they are freeholders, people who own real estate in the District of Columbia, they are naturally more apt to——

Mr. NELSON. They are naturally desirous of having a pretty good price out of the real estate when Congress wants it?

Mr. EASBY-SMITH. As I said this morning there has been no trouble here in the enforcement of the law as it exists, because they have got to assess as much benefits as they find damages.

Mr. GARD. What other qualifications, besides being freeholders, did you have in mind?

Mr. EASBY-SMITH. We have quoted the language of the various acts of Congress relating to that, and they are these:

Being also freeholders of the District of Columbia and being also, in the judgment of the jury commission, specially qualified to act as commissioners and jurors in condemnation proceedings.

Mr. CARAWAY. What qualifications must they have?

Mr. EASBY-SMITH. They must have the qualifications of jurors.

Mr. CARAWAY. And what can the jury commission do about special qualifications. What other special qualification ought they to have?

Mr. EASBY-SMITH. It is their duty to inquire into their qualifications, as we see it.

Mr. NELSON. Might that not be construed to mean experienced in the matter of getting at values of land, and then make a profession of that?

Mr. EASBY-SMITH. Let me read the law as it now is, section 491d.

SEC. 491d. After the return of the marshal and the filing of proof of publication of the notice provided for in the preceding section said court shall *cause a jury of five experienced, judicious, disinterested men, who shall be freeholders within the District of Columbia, not related to any person interested in the proceeding and not in the service or employment of the District of Columbia or of the United States, to be summoned by said marshal*, to which jury the court shall administer an oath or affirmation that they are not interested in any manner in the land to be condemned, and are not related to the parties interested therein, and that they will, without favor or partiality, and to the best of their judgment, ascertain the damages each owner of land to be taken may sustain by reason of the opening, extension, widening, or straightening of said street, avenue, road, or highway, and the condemnation of the land needed for the purpose thereof, and to assess the benefits resulting therefrom as hereinafter provided.

Parts in italics are striken out by amended section.

That is one of the provisions.

Mr. NELSON. Your langage here, "specially qualified," that might be construed to embrace experience and these other things?

The CHAIRMAN. The language in the Code seems pretty complete and fair.

Judge COVINGTON. If you will let me make a statement right in that connection?

The CHAIRMAN. You may proceed.

Judge COVINGTON. In view of the very recent proceedings in four or five quite important condemnation cases, it really is desirable to eliminate those qualifications, and for the reason that the question has been raised here by good lawyers, and seriously raised, that that imposes would be an impossible burden upon the court, to know by its own inquiry that each of the men called to serve at the time they were being interrogated, prior to having the oath administered to them, were actually judicially experienced and so on, in the language of that statute——

Mr. GARD (interposing). That could be made to appear by proper interrogation, could it not?

Mr. EASBY-SMITH. The law required, as we go along further, that the court shall interrogate.

Mr. COVINGTON. It not only requires that the court shall interrogate, but the point I am now making is that is an exercise of dis-

cretion which, if it is placed in the language of the statute, will always leave open the question as to whether the court has been accurate in its determination respecting the experience and judiciousness and all that sort of thing, and, of course, the propriety of the exercise of judicial discrimination in the selection of a juror ought not be subjected to the hazards of review on appeal. The applications ought to be fixed and the selection ought to be made by the commissioners, or some body of proper men, and when they are selected then the question of their qualifications ought to be disposed of once and for all time.

Mr. CARAWAY. Why, if a man is of good understanding and character, and he is qualified to serve on a jury where a man's life is at stake, or all his property is at stake, why would he not be a good enough man to serve as a juror in a condemnation procedure? Why should there be selected a special panel? Ordinarily—I may be mistaken about that—but ordinarily I feel that a man with particular knowledge of matters generally is a poor juror, because he substitutes his knowledge and experience for all the evidence that may be offered before him.

Mr. FLANNERY. In that connection, I should like to say that under our practice in condemnation proceedings, the condemnation commissioners, as we frequently call them, are not only jurors, but they are also judges and expert witnesses.

Mr. CARAWAY. And usually take their own testimony?

Mr. FLANNERY. They do not take their own testimony.

Mr. CARAWAY. As a matter of fact, their verdict is rendered on their knowledge, on their personal knowledge?

Mr. FLANNERY. Upon their knowledge upon the view of the land, and their knowledge of local conditions. We have had a number of cases where a great deal has depended upon the judgment of the condemnation commissioners. They not only pass upon evidence which is presented to them by trained lawyers on both sides of the case, but they also are supposed to have an intimate knowledge, not only of the history of the District and the location of various parcels of land, but of the value.

Mr. CARAWAY. They frequently go in there with too strong prejudices, do they not?

Mr. FLANNERY. Sometimes that happens, and we have had undoubtedly a great many abuses.

Mr. NELSON. He has the qualification and experience, and you require him to be specially qualified, which would include experience under the new requirements?

Mr. FLANNERY. Yes, sir.

Mr. NELSON. Would that not necessarily compel the court, or the commission, to put on men who had been condemning property right along?

Mr. FLANNERY. I think not necessarily.

Mr. NELSON. Would it not tend that way? They want some one of experience, and that means some one who has been doing that before.

Mr. FLANNERY. Of course, we have a body of real estate men here, quite a large and growing body, and in the past the condemnation commissions have usually been picked out from that body of men,

but the unfortunate part has been that a few men have been constantly appearing on these commissions. We have probably 200 or 300 men of admirable qualifications to serve on any condemnation jury here, but what we object to is to have that number of 200 or 300 limited to 15 or 20, as has been done in so many instances.

Mr. NELSON. What would you say would be the special qualifications in their experience?

Mr. FLANNERY. In a matter of this kind, where the man is passing upon the evidence, I think you have to have a higher type of men than you have in the ordinary juryman trying a civil case. He must be a man of affairs and a man who has had the experience which lawyers have of telling whether the witness is telling the truth.

Mr. NELSON. Suppose you have 12 men, or whatever number of men is required to act, as you would in any case, and evidence being submitted as to value by both parties interested, would they not arrive at a truer conclusion than men who, because they are freeholders and have been in touch with these things, have become biased—will they not be even more fair?

Mr. FLANNERY. No. In one case I have in mind I was one of the counsel for some of the land owners of the land that was condemned for the buildings over here for the capitol park. One of the commissioners was a builder and one was a real-estate man, and another had no experience whatever, either in building or real-estate matter, but was an old soldier with a good deal of common sense. We found that that commission was an admirable body. The knowledge of the builder enabled him to check up the estimates of builders who came there to testify about the value of certain houses. He had an extensive knowledge based on 30 or 40 years of experience, and he was able to puncture a good deal of their testimony about the inflated value of these buildings. The real-estate operator was a man well known here; he had improved a great many of the outlying sections of the District, and when testimony was offered by interested parties he was able to ask a great many pertinent questions which brought out the facts, which otherwise would not have been brought out.

The CHAIRMAN. Mr. Flannery, would you get any such jurors as you describe as admirable under the language here?

Mr. FLANNERY. We think we would, if the jury commission did its duty.

The CHAIRMAN. Would they ever select an old soldier?

Mr. FLANNERY. They might select an old soldier, if he was intelligent—if he had good common sense.

The CHAIRMAN. Would they examine the qualifications of every man selected?

Mr. FLANNERY. We think so—before they put these men in this special box of 100 that they shall know——

The CHAIRMAN (interposing). This language, "specially qualified," is like the language just read by Mr. Easby-Smith from the code.

Mr. TOBRINER. Why not take out "specially" in line 2?

Mr. FLANNERY. I have no objection to that. It was to try to preserve the language of the original statutes. They do not agree at all. We did not want to make any more changes than we had to, and we hoped, by changing the form of getting the jury, we would endeavor to get better jurymen for this special service.

Mr. GARD. Are there any condemnation suits other than those brought by the Government in the District of Columbia?

Mr. FLANNERY. Yes; we have a great many railroad condemnation suits, and in an experience going back nearly 25 years I have had the misfortune to represent a great many of the railroad companies in those suits. I have also represented a good many property owners in Government condemnation suits, and I have seen this thing work both ways.

Mr. CARAWAY. I have in mind a condemnation suit where the jury found out it would be absolutely of no advantage to go on the land.

Mr. FLANNERY. Yes.

Mr. EASBY-SMITH. We suggest, if it is entirely agreeable to the committee, to begin at the top of page 33, in line 1, and after the words "District of Columbia," strike out entirely the remainder of that sentence; either leave it blank there or insert in lieu thereof the exact language of the statute that is now in effect. We might stop right at the "District of Columbia."

Mr. GARD. That would practically lead to the elimination of this box of 100 names.

Mr. EASBY-SMITH. Except they must be freeholders. My own personal idea would be to insert in lieu of what we are striking out the language of the section which I read to the committee.

Mr. NELSON. The language now narrows you to a very small class—"in the District of Columbia."

Mr. GARD. Your ordinary jury law does not include the word "freeholders," does it?

Mr. EASBY-SMITH. No. "Shall cause a new jury of five experienced, judicious, disinterested men, who shall be freeholders in the District of Columbia." If we want to insert after the words "District of Columbia," "and being also freeholders of the District of Columbia."

Mr. GARD. That is in there once.

Mr. EASBY-SMITH. Yes; I mean after that: "And being in the judgment of the commissioners experienced, judicious, disinterested men." That will be the language of the present statute.

Mr. CARAWAY. Let me ask you a question. Of course, I am seeking information. Has not your present statute, that you have just read, led to so many abuses that it does not commend itself very strongly?

Mr. EASBY-SMITH. That is true, sir, for this reason: That under the present law the only power of selection rests in the United States marshal. The court says, "Go out and bring five men in here to serve as condemnation jurors in this case," and the five men are usually sitting in the first row of seats; they come forward and are sworn, and they are men who have acted over and over again. That is one of the abuses we want to meet.

Mr. IGOE. If we raise this limit to 100, would that help to avoid the evil? Why should it be confined to 100?

Mr. EASBY-SMITH. There has got to be 100 in the box at every time and every day.

Mr. GARD. If any are taken out, they put it up to the number of 100.

Mr. TOBRINER. If 7 are taken out, 7 are added.

The CHAIRMAN. If you take out 15——

Mr. TOBRINER. You have got to put in 15 before the next drawing.

Mr. GARD. If you strike all that out I think it would be better.

Mr. EASBY-SMITH. After the words "District of Columbia"?

Mr. GARD. Yes.

Mr. EASBY-SMITH. After the words "District of Columbia," down to "The" in the fourth line.

The CHAIRMAN. Is there anything further on that section?

Mr. EASBY-SMITH. No, sir. The remaining sections——

Mr. COVINGTON (interposing). Are you going to stop at the words "District of Columbia"?

Mr. EASBY-SMITH. And have nothing else?

The CHAIRMAN. That is the suggestion.

Mr. EASBY-SMITH. Speaking now of the matter that the court, after all, has no particular interest in, I think that sufficiently restricts it; also, you provide they should be freeholders, which certainly is desirable; the limiting of the jurymen to freeholders in itself will sufficiently safeguard it, with the supervision the court has over the selection of the particular individuals in each case.

I was going to say, as to the remaining sections, that there is no substantial change in them; they simply conform with 484a, that these names, instead of being selected by the marshal at large, are drawn from the box, and that includes commissioners as well as jurors.

The CHAIRMAN. I want to turn for a moment to section 218, page 20.

Mr. EASBY-SMITH. That is the matter of disbarment, and I think Mr. Tobriner was a special committee having to do with that.

Mr. TOBRINER. You will observe that sections 219, 219a, and 220 are new matter. I was also a member of the committee on grievances of the Supreme Court of the District of Columbia, and in instituting proceedings in disbarment we found that the rules of the court, as affected by decisions of the court of appeals in cases of disbarment which had been carried to the court of appeals, were not broad enough, and the statute was not broad enough under those rules to meet the exigencies of disbarment cases, so we have revised that section of the code which gives to the court authority not only to examine and admit but also to discipline, censure, and disbar—rights which we conclude, under the code, the code had not conferred.

The CHAIRMAN. You are speaking of section 219 now?

Mr. TOBRINER. Of sections 218 and 219. The new matter in section 218 is the addition of words, in line 7, "of examination," giving the court the right to make rules covering the examination, application and admission of persons to membership at this bar, and for the discipline, censure, and expulsion. Section 219 is new matter altogether, so far as the code in concerned, and we came to the conclusion it was necessary that the court, under the peculiar conditions of the code, should have that right.

Mr. CARAWAY. Under section 218 you are giving the court the power to prescribe the rules under which members of the bar may be disbarred. Heretofore it has been a question of statute.

Mr. TOBRINER. Yes; heretofore it has been a question of the statute.

Mr. CARAWAY. Now it rests altogether within the discretion of the court?

Mr. TOBRINER. No, sir; we have part of it in section 219, the grounds for suspension, the censure, or the expulsion.

Mr. CARAWAY. Why give the court the power to make the rules in one case and then specify in the next section what those very things shall be? In line 7, you know, you give the court the power——

Mr. TOBRINER. Of examination, application, and admission.

Mr. CARAWAY. And the censure, suspension, and expulsion in line 9 is also under the same rule:

The Supreme Court of the District of Columbia, in general term, shall have power and authority from time to time to make such rules.

Mr. TOBRINER. That would be in respect to the mode of procedure also in disbarment cases. We think there ought to be specific authority to govern those cases by rules.

The CHAIRMAN. Why, in line 17, do you use the word "expel" any member instead of using the word "disbar"?

Mr. TOBRINER. In the judgment of the grievance committee, who really drafted this provision, it thought it necessary and more proper that the word "expel" should be used. I think we took the word from the New York statute—the New York rule.

The CHAIRMAN. In line 19, "or any conduct prejudicial to the administration of justice." Where did you get that langauge?

Mr. TOBRINER. From the New York statute.

The CHAIRMAN. How was that word used there—what kind of cases have arisen that disbar a man for "conduct prejudicial to the administration of justice." Any fraudulent act or misrepresentation by an applicant in connection with his application or admission, etc.?

Mr. TOBRINER. Interference with the course of trial, witnesses, and matters of that kind.

The CHAIRMAN. That would be misconduct—professional misconduct and malpractice, would it not?

Mr. TOBRINER. It gives the court broad power. It simply broadens the authority of the court.

The CHAIRMAN. I am willing to give the court broad power, but we ought not to make it too broad, for the lawers have some rights, of course. I was wondering what cases would fall under that particular language that are not covered by professional misconduct or malpractice and deceit.

Mr. TOBRINER. Certainly the interference with the administration or trial of a case with which a party was not interested as an attorney would be covered by that, whereas it would not be covered by the previous language of the section. We thought we would make it broad enough to cover any case in which an attorney should be disciplined.

Mr. CARAWAY. If a judge happened to have a particular dislike to any attorney, could he not get rid of him?

Mr. NELSON. It has got to be in general terms.

Mr. TOBRINER. Charges have to be preferred in general terms, first referred under the practice of the court to the grievance committee, and the grievance committee investigates and, if it finds proper, thereupon a rule issues and trial is had.

Mr. DANFORTH. And the case is reviewed by the court of appeals?

Mr. TOBRINER. Yes, sir; cases of that kind.

Mr. IGOE. What cases?

Mr. TOBRINER. In general terms or in the supreme court.

The CHAIRMAN. Suppose you should appeal it, would the court of appeals pass on whether the conduct was prejudicial to the court of justice?

Mr. TOBRINER. The court of appeals may either modify or revoke the judgment.

Mr. CARAWAY. It can review or convict?

Mr. TOBRINER. Both.

Mr. CARAWAY. Is it a trial de novo?

Mr. TOBRINER. It is not a trial de novo, but on the record.

The CHAIRMAN. I suppose if you lawyers do not object to the language we should not object.

Mr. NELSON. What is the purpose of censure?

Mr. TOBRINER. There may be cases where the conduct of an attorney may be such that would not justify an expulsion or suspension, yet he may be subject to criticism and should be censured.

Mr. CARAWAY. Do you spread that on the record?

Mr. TOBRINER. That is a matter within the discretion of the court.

Mr. IGOE. I rather think sometimes they may be censured anyhow.

Mr. NELSON. It may be an easy way out, just to censure a fellow and neither suspend nor expel him.

Mr. TOBRINER. Exactly; it would not subject him to that hardship.

Mr. IGOE. You are sure there is an appeal in all these cases?

Mr. EASBY-SMITH. I may say to the committee that one case I took up made the necessity apparent. Some 10 or 12 years ago the court of general terms disbarred a member of the bar. I took the case up as a matter of principle, because I felt the court had gone away beyond its powers, both on the facts and the law, and the court of appeals reversed it and ordered him reinstated, but, while I think the court was right in its construction of the law, I thoroughly agree with the members of the committee that the court below ought to be given greater power than it now has.

Mr. IGOE. Does it extend any further now than conviction on some crime?

Mr. EASBY-SMITH. Yes; we are taking it away beyond that.

Mr. IGOE. In the law as it now is?

Mr. EASBY-SMITH. At the present time disbarment may be had only on conviction of crime or on account of withholding a client's money when he has made demand for it.

Mr. IGOE. And there must be a conviction.

Mr. EASBY-SMITH. A conviction of crime, involving moral turpitude before you can disbar him.

The CHAIRMAN. Where did you find that law which gives you the right to disbar a man?

Judge COVINGTON. That is in the code.

Mr. TOBRINER. That was the only thing in the code authorizing disbarment.

The CHAIRMAN. Now, you enlarge it, putting in "crime, misdemeanor, fraud, deceit, malpractice, and professional misconduct," and then you put in "or any conduct prejudicial to the administration of justice."

Mr. EASBY-SMITH. We felt safe to leave it to six judges sitting in general terms to decide whether or not under these general facts these men had been guilty of conduct prejudicial to the administration of justice.

Mr. CARAWAY. You have in the law "any offense." If he got drunk after starting from the court to his home, the court might take action and disbar him for it?

The CHAIRMAN. It does not say he shall be disbarred.

Mr. DANFORTH. Put the case the other way, that he appears in court drunk—in an intoxicated condition.

Mr. EASBY-SMITH. And repeatedly did it?

Mr. DANFORTH. He might be censured.

Mr. HOEHLING. This does not require disbarment. He may be censured.

The CHAIRMAN. Take up section 219a.

Mr. TOBRINER. The effect of that is to make the record of the conviction work automatically.

The CHAIRMAN. It is conclusive against it?

Mr. TOBRINER. Yes, sir.

Mr. HOEHLING. Where he has been convicted of a crime?

Mr. IGOE. In case of appeal pending——

Mr. TOBRINER (interposing). It provides for that farther down, in lines 7, 8, and 9: "He shall thereafter cease to be a member thereof. Upon a reversal of such conviction or the granting of a pardon, said court shall have power to vacate or modify such order of disbarment."

Mr. IGOE. The disbarment of suspension is wholly pending appeal?

Mr. TOBRINER. And in the event of a reversal he is automatically reinstated.

Mr. EASBY-SMITH. No; it would not automatically restore him. That is one difficulty I see for the first time.

Mr. CARAWAY. The court does not have to reinstate him if it is reversed?

Mr. TOBRINER. I notice that.

Mr. IGOE. If a man takes an appeal, why should he be disbarred pending appeal?

Mr. CARAWAY. I recall the other day that you gentlemen disbarred a man and the supreme court reversed the case.

Mr. EASBY-SMITH. He was not disbarred. Proceedings were started for his disbarment, but they were suspended by the lower court pending his appeal.

Mr. CARAWAY. I read the report; I relied upon what I saw in the paper.

Mr. FLANNERY. It seems to me, under section 219, that upon a conviction, and in the event of an appeal, there should be only a suspension and not a disbarment. We will take leave to change that section, with the approval of the committee.

The CHAIRMAN. You may amend, as suggested, either now or hereafter.

Mr. IGOE. As a matter of fact, even under other provisions a man might be suspended, expelled or suspended, regardless of the conviction, if accused?

Mr. TOBRINER. Yes, sir.

Mr. DANFORTH. That section does not act automatically. As a matter of fact, the court, in general term—six judges—are not going to strike a man's name off of the rolls if a bona fide appeal is pending.

Mr. TOBRINER. We had two such cases only lately where there were convictions and appeals pending, pending the preferment of charges, and thereupon the court continued the cases.

Mr. EASBY-SMITH. Yet, the last sentence in section 219a, I think, would make the whole section construed so as to practically compel the court to disbar. It says, "shall have power to vacate or modify such order of disbarment."

Mr. TOBRINER. The words, "should have power," in 219a, should be stricken out.

Mr. IGOE. They still have power under section 219, if passed.

Mr. FLANNERY. That is a question.

Mr. DANFORTH. That just means for a trial.

The CHAIRMAN. If he is disbarred upon a verdict of the jury, and later that verdict is set aside, he ought to be restored to his former state.

Mr. EASBY-SMITH. Yet an unbroken line of English and American authorities is to the effect that if a man is convicted by a jury, that even though there be a motion in arrest granted, he nevertheless may be disbarred.

The CHAIRMAN. It seems to me you ought to take it up under the prior section.

Mr. IGOE. I do not see why you have not that full power under section 219 to do anything you want with him.

Mr. EASBY-SMITH. The only purpose of section 219a was to avoid the necessity of retrial of a matter in case of conviction by a petit jury.

The CHAIRMAN. But you do not want to take a man's profession away from him when the supreme court says he is not guilty, do you?

Mr. EASBY-SMITH. We can easily amend this by saying that shall operate in such a manner when said conviction shall become final.

Mr. TOBRINER. Why not simply take the words "shall have power" out of line 9?

Mr. GARD. I do not think those words should be stricken out—"shall have power"—that is a very proper phrase to have in there. You can find cases where the conviction might be reversed in the court of appeals on a technicality, set back again on a retrial, then this language, being mandatory, would require the order of vacation.

Mr. NELSON. If the case merits, he could appeal under this, and the court would have the discretion of reinstating him.

Mr. IGOE. You will destroy section 219, which I supposed gave the court the power to suspend or suspend without conviction.

Mr. TOBRINER. But the court has held that power of expulsion or suspension must be in a proper manner. You have to have a course of procedure to do that. For that we have provided in section 220. But to avoid the necessity of going through a whole trial of the case where a man has actually been convicted, we have provided in section 219 that that record of conviction shall be ground for suspending him without further procedure on trial.

The CHAIRMAN. If you make it that large now, do you not think the reverse ought to be true—if he were acquitted in the higher court he ought to be reinstated?

Mr. TOBRINER. Yes, sir.

The CHAIRMAN. Certainly, when you have a chance at him under sections 218 and 219.

Mr. TOBRINER. Yes, sir; that is the reason I think the words "shall have power" ought to be taken out.

The CHAIRMAN. I think that is fair.

Mr. GARD. We might say upon final reversal of such conviction.

Mr. TOBRINER. The reversal, under our mode of practice, would be a final reversal so far as that trial was concerned. Then you would have to go back and try de novo. It would be a new trial.

The CHAIRMAN. If he is convicted again, you can disbar him.

Mr. TOBRINER. Then you might have another final conviction.

The CHAIRMAN. In the meantime you can proceed under sections 218 and 219, probably.

Mr. DANFORTH. Do you think that your weak professional brethren should be restored to practice because of the granting of a pardon?

The CHAIRMAN. Yes.

Mr. DANFORTH. You do?

The CHAIRMAN. I do. It restores everything else. It restores the right to vote, and I do not see why it should not restore the right to make a living.

Mr. TOBRINER. It is a property right.

The CHAIRMAN. Certainly it is, and a very serious right, too.

Mr. GARD. I think in some cases it should be restored and in some it should not. I am inclined to think that this language, "shall have power," is very proper language.

Mr. DANFORTH. It seems to me that the privilege to practice law should not be restored.

The CHAIRMAN. Mr. Danaforth, you can get under section 219 here. The power is very full to proceed against an attorney to disbar him. If he has been tried and restored, you can proceed against him under section 219.

Mr. DANFORTH. That means a long and expensive trial.

The CHAIRMAN. It ought to be; it ought to take a little time to disbar a man. It is a very serious thing to take a man's life profession away from him, I think.

Mr. EASBY-SMITH. I might say that Mr. Gard has expressed my opinion as to the pardon. I do not think this language ought to compel the court to restore a man simply because he is pardoned. I think the proper way to change it now is to change the fore part of it; to let this operate only in cases of final conviction after appeal; and then leave the last sentence as it was, giving the court power to restore in case of a pardon, etc.

Mr. TOBRINER. In the meantime you have the man practicing. There may be a final affirmation of the conviction, and in the meantime he has been going on, in all probability doing the same thing.

Mr. EASBY-SMITH. I suggest you ought to have——

The CHAIRMAN (interposing). You gentlemen have got somewhat the idea of the committee, and se if you can not draw a section as has been suggested.

Mr. GARD. Mark this for amendment.

Mr. TOBRINER. Section 220 provides for the course of procedure when charges are preferred. That is all new matter, and the important element of that is the matter of service of the charges upon the respondent, which the court may direct to be done if it can be served personally either by mail, publication, or otherwise, as the court may direct. Under the old rules of court procedure personal service was required, and we found quite a number of former alleged members of the bar against whom we were proceeding were inmates of the penitentiary at Leavenworth or at Atlanta, so we could not get personal service on them.

Mr. CARAWAY. You could get it when they came back?

Mr. TOBRINER. We did not want to wait that long.

We have also provided that, "the court shall have power, pending the trial thereof, to suspend from practice the person charged."

Mr. CARAWAY. Do you have any provision in your statute to grant him a trial? Why could not your court, under your statute, suspend him and never give him a trial?

Mr. TOBRINER. It is assumed that the court will be reasonable about the matter and give him speedy trial.

Mr. CARAWAY. I think in all probability it will, but you have no provision here.

Mr. TOBRINER. We have no provision making it imperative.

Mr. GARD. Why do you have provision to suspend him before trial?

Mr. TOBRINER. That would cover cases of this kind. I have in mind one particular case where a lawyer, who was charged with the embezzlement of a very large amount of money, disappeared. We were never able to find a trace of him so as to make service on him by publication or otherwise. The result of it was that he appeared and continued to remain upon our records as a member of the bar.

Now, for the purpose of meeting any situation of that kind, where we can not get service on him one way or the other, we think the court should be able to do something pending the charges; consequently he should be at least suspended from the privilege to practice.

Mr. GARD. That is pretty wide authority. The charge is filed before any hearing at all, and it provides that the court may, in its discretion, suspend him.

Mr. NELSON. There is always the possibility of an appeal in that case, if there is an actual harm done.

Mr. DANFORTH. Are these proceedings all had in the general term?

Mr. TOBRINER. Yes, sir.

Mr. NELSON. I suppose there may be an appeal, even where he is suspended?

Mr. TOBRINER. Yes, sir.

Mr. NELSON. But if the man were away he could not get an appeal?

The CHAIRMAN. He could get a special appeal from suspension.

Mr. FLANNERY. Any order of our local courts can be taken up by special appeal.

Mr. CARAWAY. How long after appeal before he can get a hearing?

Mr. FLANNERY. Very quickly now. They reach your case in the court of appeals sometimes before the record is printed now.

Mr. CARAWAY. Under that provision a man might be out of practice a year, might he not?

Mr. TOBRINER. By no means; there is no possibility of that.

Mr. CARAWAY. After the charges were filed he might, before he could be tried?

Mr. TOBRINER. After the charges are filed, then the court, in general term, makes its rule on the respondent, and that rule may be returnable in 10 days or two weeks, depending——

Mr. DANFORTH (interposing). Before the general term?

Mr. TOBRINER. Yes; before six judges.

Mr. NELSON. In the general term, the same court?

Mr. TOBRINER. Exactly, the same men.

Mr. NELSON. So no personal feeling would guide him?

Mr. TOBRINER. None at all.

Mr. SULLIVAN. Sections 276 to 280, page 22, have been modified only so as to put the husband in the same category as the wife with regard to administration. In other words, at the present time, under section 1160 of the code, the husband is given the executive right of administration in all cases over his wife's estate, regardless of whether he may have deserted her or left her 20 years previously, or what the condition may be. The only change there is to put in the words, "or surviving husband" in every place where the word "wife" appears, and we strike out "later" in 1160, which dealt with the husband's absolute right of administration. We put him absolutely on the same equality with his wife.

Then in section 306, page 23, it provides for a collector in the probate court, being authorized to conserve real estate as well as personal property. At the present time we have to go into the equity court.

The CHAIRMAN. What is a collector here?

Mr. SULLIVAN. A special officer appointed pending the trial of an issue. An issue as to who shall be administrator or who shall be executor. It would simplify appeals.

Mr. GARD. A temporary receiver?

Mr. SULLIVAN. A temporary receiver.

Mr. IGOE. Is there any hearing provided here for the heirs or beneficiaries under the will as to the real estate?

Mr. SULLIVAN. The situation will be the same as with respect to the collector of the personal property.

Mr. IGOE. I understand that, but the necessity for taking charge of personal property may be vastly different than of real estate. I may explain, for instance, the heirs are entitled to the real estate. There may be personalty enough to take care of all the debts. Do you want to give the collector authority to take possession of the real estate in all cases?

Mr. SULLIVAN. This does not provide for it. It simply says, "The said collector may, if thereto authorized by the court, take possession of, hold, manage, conserve, and contral all real estate affected by the will or wills in dispute." Only in so far as real estate is involved in that proceeding does the court exercise any control over it in the matter of this collector. In other words, it simply enables him to do——

The CHAIRMAN (interposing). In line 13, "The said collector may, if thereto authorized by the court." I am not a stylist, but is that all right?

Mr. SULLIVAN. In other words there has got to be some special showing to the court.

Judge COVINGTON. The chairman is addressing himself merely to the phraseology. I think myself it should be "if authorized."

Mr. SULLIVAN. Strike out the word "thereto."

The CHAIRMAN. Mr. Caraway wants to ask you a question about the commission, in line 24, not exceeding 10 per cent. Is that new?

Mr. SULLIVAN. Yes; that is new. The old percentage was 3, but that was because he was acting then simply as a receiver for a temporary period; but under this he is not only a receiver, but he acts for all purposes, as administrator to wind up the estate and to close it up and to do everything that the administrator would do. In this Hutchins estate, for instance, Mr. Dante, the collector and trustee, has been holding on now for some years, and still the litigation goes on.

Mr. CARAWAY. If it was much of an estate, he could afford to hold on for a century.

Mr. SULLIVAN. But the creditors can not afford to.

Mr. NELSON. What do you say to this suggestion: That you fix a commission of 10 per cent——

Mr. SULLIVAN (interposing). That is, not more than 10 per cent. In other words, that gives the court discretion and power to relieve him, if he does all the work an administrator would do—to give him the same commission that an administrator would get.

Mr. GARD. Does an administrator get as much as 10 per cent?

Mr. SULLIVAN. From 3 to 10 per cent. The court has to give him 1 per cent. Where the amount is small the commission might be 10 per cent, but where the estate is large the court could allow him less.

Mr. CARAWAY. He comes in and shows that he has collected and disbursed the estate, and he asks for so much commission—usually 10 per cent, of course?

Mr. SULLIVAN. I think you will find it is quite to the contrary.

Mr. CARAWAY. Does anybody ever ask for less than that?

Mr. SULLIVAN. They very seldom ask for that much.

Mr. CARAWAY. The court very rarely has the time to go in and determine whether or not he expended much energy and time in administering the estate. Does he usually get what he asks for?

Mr. SULLIVAN. Oh, no.

Mr. CARAWAY. I remember, under your present practice of having three guardians appointed for somebody where his mind failed him, that some fellow here they had been carrying around to Atlantic City and back again, at an expense of forty or fifty thousand dollars a year.

Mr. TOBRINER. That was the Peters case.

Mr. CARAWAY. Who appointed the guardian?

Mr. TOBRINER. The court appointed the guardian.

Mr. CARAWAY. It strikes me that is an unreasonable amount to pay out for an administrator—one-tenth of the accumulation of a lifetime.

Mr. SULLIVAN. We have to provide in some way a general law for all cases. The amount the collector would get altogether might not exceed five hundred or a thousand dollars. If it were $500, 10 per cent of that would give him, at the outside, $50, and he might have to do a great deal of work for that.

Mr. NELSON. It seems to me that there is a suggestion here that 10 per cent is about right. Would the court, in its discretion, hold you down——

Mr. SULLIVAN (interposing). It says "not exceeding 10 per cent."

Mr. GARD. Why not have it a ratio of percentage based upon the amount of the estate he collects? In other words, on a small estate, you might allow him 10 per cent, and on a large estate possibly only 2 per cent.

Mr. SULLIVAN. But you can not gauge by any one estate what might be the services in another estate.

Mr. IGOE. There might be a great deal of litigation and bother.

Mr. NELSON. Strike out the 10 per cent, and leave it to the discretion of the court.

Mr. FLANNERY. The law as it stands in reference to administrators and executors is the same as it is here; not less than 1 and not more than 10 per cent, and we have been working under that for 14 years. The average rate of commission in large estates is around 2 to 3 per cent. In smaller estates—estates around a hundred thousand dollars, the commission averages around 6 per cent.

Mr. IGOE. How much does the court allow usually in receivership cases?

Mr. FLANNERY. That varies according to the work done by the receivers.

Mr. SULLIVAN. Suppose we put in here the language that is used in connection with an administrator—not less than 1 nor more than 10 per cent?

Mr. NELSON. That would at once suggest the 10 per cent idea.

Mr. SULLIVAN. That is the wording of the Code at present.

Mr. TOBRINER. Under the rules of practice of the court, when an administrator or collector, or whatever the fiduciary is to be under the rules, he is required to send notice to each party in interest—all creditors and distributees, as well as the next of kin, advising them of the date of settlement of the account, and the amount of the commission which he will demand. Thereupon on the return day the parties in interest have a right to come in and be heard on the question of commission.

The CHAIRMAN. Is the language in lines 22, 23, and 24 clear? What does that mean? The collector may be allowed a commission on the personal property, whether he ever touches it or not.

Mr. TOBRINER. No; actually collected.

The CHAIRMAN. But no rentals collected—read that, Mr. Easby-Smith.

Mr. EASBY-SMITH. Yes; I see.

Mr. TOBRINER. The collector is entitled to compensation for handling the personal property until he turns it over to the administrator.

Mr. IGOE. He takes the place of the administrator.

Mr. TOBRINER. Exactly.

Mr. CARAWAY. If there are a hundred thousand dollars in the bank, and it technically came into his possession, and he passes it on, he can get a commission on it?

Mr. TOBRINER. If there were a minimum commission, the court would allow that; but if there was no minimum commission, the court would allow the commission in the discretion of the court.

The CHAIRMAN. Is this the language as it is to-day?

Mr. HOEHLING. I think that word "debts" does not look right.

Mr. TOBRINER. That was intended to mean debts due the estate.

Mr. GARD. And collected?

Mr. TOBRINER. Yes; and collected.

Mr. GARD. If you would cut out that comma and say "debts and rentals actually collected"——

Mr. SULLIVAN (interposing). The language in the old form was "commission on the debts and rentals actually collected."

The CHAIRMAN. Suppose you redraft that section. I do not think it is clear at all. Redraft those three lines.

Mr. DANFORTH. I would like to suggest that if this is to be redrafted, the suggestion made that the commission shall not be less than 1 nor more than 10 per cent will probably give a larger percentage than is contemplated by the original draft.

The CHAIRMAN. That is right. You had better not have a minimum at all. I think you ought to strike out the minimum.

Mr. DANFORTH. If they collect it on personal property, they have a right to charge something for collecting it.

Mr. COVINGTON. If the committee will permit me, oftentimes a man who is a temporary collector of an estate during the pendency of litigation, after the litigation is determined will become, by appointment, or else by the will, either the administrator or executor of the estate. The court then has the power to take into consideration what he may receive in his original position, or scale down his commission in the original position to the vanishing point, if you please, in view of what he will get as administrator, and it may very well be that the court will only allow him 5 per cent as administrator and allow him a negligible fee as collector, or conversely, the thing may have run for so long that the court will want to give him 5 per cent, say, as collector, and nothing, practically, as administrator; and that is to be considered in determining this question.

The CHAIRMAN. Without objection, I want to ask the committee of the bar association to redraft those three lines and to submit it to the committee later on.

Who usually appoints these collectors? Is it the same man all the time, or different men?

Mr. TOBRINER. Oh, no. The court.

The CHAIRMAN. There is no public administrator?

Mr. TOBRINER. No.

Mr. SULLIVAN. The new matter at the top of page 24 merely provides for the bond of the collector covering his duties with respect to the real estate as well as with respect to personal property. Now, section 307 merely adds a clause at the end permitting the collector to defend a suit brought against him by a creditor of the estate, so that he is acting in all respects as an administrator.

The CHAIRMAN. Did not some one state a while ago that a collector could not be sued?

Mr. SULLIVAN. He could not, but we are providing in these sections that he may. In other words, the first duty of the estate is to its creditors. If the next of kin want to enter into a long controversy for the remainder, that is one thing, but the rights of the creditors are paramount. That is the reason we have provided for this suit.

Mr. IGOE. Have you any method whereby claims can be proved up?

Mr. SULLIVAN. Yes; you can prove them up, but you can not collect them; but you can under this section.

Mr. IGOE. In a probate court, a claim against an estate, after it is allowed, is it not supposed to be paid without any further suit?

Mr. HOEHLING. There is nobody to pay it.

Mr. IGOE. In the case of an administrator?

Mr. HOEHLING. Oh, yes; in the case of an administrator.

Mr. IGOE. So why should it be necessary to sue the collector? Why should not the decree of the probate court operate the same with the collector in charge as it would with the administrator?

Judge COVINGTON. That is what this does.

Mr. EASBY-SMITH (reading):

And shall be liable to an action by any creditor of the deceased and shall be entitled to the protection of any provision of law expressly relating to executors and administrators.

Mr. IGOE. What action?

Mr. EASBY-SMITH. If he refuses to pay a claim, then he may be sued.

Mr. SULLIVAN. In other words, the mere allowance of a claim in the probate court does not mean the granting of it. It simply means that it is probated; it has been verified in accordance with law.

Mr. IGOE. What is the practice in regard to an administrator?

Mr. SULLIVAN. When it has been verified, that is given to the administrator, and the administrator either pays it or rejects it. If the administrator rejects it, then the creditor can sue him in an ordinary action at law.

Mr. IGOE. In my State a man proves up his claim in the probate court, and it is passed upon by the judge and allowed, and it is a judgment against the estate.

Judge COVINGTON. We have not that practice here.

The CHAIRMAN. What is the necessity for a collector? Why do you not establish an executor or an administrator to begin with?

Mr. SULLIVAN. Because the question is whether he has any footing to stand on.

Mr. GARD. Just as a collector can not agree on an administrator or executor?

Mr. SULLIVAN. The question of who is to be the administrator is in issue. The court can not appoint a caveator; that would invite and encourage a contest of wills, but he can appoint the executor.

Mr. TOBRINER. The necessity for a collector only arises where there is a probate of a will or a contest over a will. It is the same as a temporary administrator in the States.

The CHAIRMAN. At the time a man dies, if he is is not qualified, in my State, they put him out, and he acts under the court's direction all the time.

Mr. IGOE. Suppose you have a will contest, and the parties in interest want an administrator pendente lite, what do you do?

The CHAIRMAN. The court can put in another one.

Mr. IGOE. That is all this is.

The CHAIRMAN. There is no way of duplicating fees and commissions.

Mr. SULLIVAN. Section 308—the only change is that in the old section the clause prohibiting a suit against a collector is stricken out.

Section 308a provides for service upon a fiduciary who has absented himself from the jurisdiction. In other words, an executor or an administrator, if he refuses to pay a debt, he can only be made to do so by a suit. He may go to Hawaii or to some uninhabited island, and yet there would be no provision for suing him, but this provides whenever a fiduciary is appointed, he shall, before the issuance of his letters, sign an irrevocable power of attorney, making the register of wills office a proper party for service upon him of any process. That is to prevent frauds upon creditors by absent fiduciaries. Now, section 310 merely adds the words "or letters of collection" at one place, and "or collector" at another, so as to provide for this appraisement of the personal estate.

The CHAIRMAN. Is not that 10 days a little bit short to give a man, there is line 25?

Mr. GARD. That is 10 days after the passing of the appointment.

Mr. SULLIVAN. That is only as to whether he signs a power of attorney. Section 310 merely provides for appraisement where a collector is appointed, as well as where there is an administrator or executor. Section 321 is extended to collectors. Sections 374 to 377, inclusive, put the husband in the same situation as the wife.

The CHAIRMAN. Section 374; is that a material change in your law here?

Mr. SULLIVAN. That is a very material change, because under section 1160 at the present time, the husband gets all the personal estate of his wife, whatever may be the conditions, and he gets the absolute right to administer upon her personal estate, but by this he is given exactly the same as the wife would get. In other words, if they have no children, he gets one-half.

Judge COVINGTON. That is the only change that these proposed amendments make in our substantive law.

Mr. SULLIVAN. Where a man dies, leaving a personal estate of only a thousand dollars, there might be a question of whether that whole thousand dollars should not go directly to the wife, instead of having her subjected to probate proceedings.

Mr. IGOE. What is the amount now that a widow may receive?

Mr. SULLIVAN. There is none. There is an exemption of household goods of $300. There ought to be some.

Mr. IGOE. Have you made any provision for it?

Mr. CARAWAY. "If there be a widow or surviving husband and a child or children, or a descendant or descendants from a child, the widow or surviving husband shall have one-third only." That is without any regard to the amount of the estate?

Mr. SULLIVAN. We do not consider a limitation upon that in the case of a small estate.

Mr. TOBRINER. At common law she only got a reasonable part. What that was, was in the air.

Judge COVINGTON. This is the law that we inherited from Maryland, and all we have done is insert the phrase "surviving husband," and thus put him on the same plane with the wife.

Mr. GARD. Section 376 is one that I do not understand very well. I have just been glancing over it hastily. It provides:

If there be a widow or surviving husband and no child or descendants of the intestate, but the said intestate shall leave a father or mother, or brother or sister, or child of a brother or sister, a widow or surviving husband shall have one-half.

Mr. SULLIVAN. In other words, where there are no children, the surviving spouse gets half. Where there are children, the surviving spouse gets one-third. That is the present law, but under the present law there is a discrimination between the husband and the wife, and we are eliminating that discrimination. But that other suggestion about a small estate is a matter, I think, that might well be considered before this goes through.

Mr. DANFORTH. It might be well to put it in here while you are at it.

Mr. SULLIVAN. It was suggested to me a couple of weeks ago by the deputy register of wills.

Mr. IGOE. Do you make any provision under that law here, where the estate is only the household stuff? You have your exemption now; you do not require administration there at all?

Mr. SULLIVAN. No. As a matter of fact, if there is administration, they are not required to prove it in the appraisal. The creditors could not take it.

Mr. IGOE. Of course, if you make your exemption, say, a thousand dollars, or seven hundred, or six hundred dollars, or whatever it may be, you could provide also that on such a showing by an affidavit filed, there would be no administration necessary.

Mr. SULLIVAN. Of course there would be some objection to that additional exemption.

Mr. GARD. Is there any exemption at all now?

Mr. SULLIVAN. There is no exemption, except the clothing. Of course there ought to be.

Mr. GARD. What is that supposed to represent in entire value? A thousand dollars?

Mr. TOBRINER. Yes. If a person happened to have a horse and wagon, and stock in trade, and $300 in furniture——

Mr. IGOE (interposing). Do you make any provision of money in lieu of those things?

Mr. SULLIVAN. No; I think the law is deficient at present in that respect.

The CHAIRMAN. You have no homestead here?

Mr. SULLIVAN. No.

Mr. GARD. Do you not think you should have a first year's provision for the widow?

Mr. SULLIVAN. Yes; I think so. There should be something to equal that.

The CHAIRMAN. It should be called the "first-year's allowance for the support of the widow," I think. That is a very admirable part of the law.

Mr. SULLIVAN. The next section, 445, deals with attachments before judgment. Under the old section it was limited to any action at law in the Supreme Court of the District of Columbia. In practice, however, we are using the same provision in the municipal court. This is simply to make legal that which is now of doubtful legality, and apply to the municipal court. You will find on the next page, number 28, lines 3 and 4, the words, "supported by the testimony of one or more witnesses," are stricken out. In the case of a nonresident attachment, or in the case of an attachment because of the debtor conveying his property away to defraud

creditors, or concealing it, or concealing himself, it is almost impossible for anyone other than the plaintiff to know what he actually does. The plaintiff has to give a bond in twice the amount of the claim to protect the defendant in the event there is a wrongful attachment, but the requirement of this supporting affidavit results only in perjury. They have to get somebody who knows the facts, and they do not.

Mr. GARD. He has to prove it anyhow?

Mr. SULLIVAN. Yes. The bond already protects them, so we advise that that go out. Then you will find in lines 17 and 18 the words "and has estate or debts owing to said defendant in said District." That is merely a formality. Whether he has estate or debts, the plaintiff might not know actually whether he has it, but he might be able to get it, and he is entitled to do that. Then, section 455.

Mr. GARD. What page is that?

Mr. SULLIVAN. Pages 29 and 30. At the present time there is a provision for release from attachment, upon giving a bond for personal property which has been seized by this nonresident attachment. but there is no provision for the release of credits which would be attached under a garnishment, so that a large fund might be held up. and do great injury to the poor defendant, whereas a bond would amply protect the plaintiff, the same as in the other situation. It is merely to meet that deficiency.

Sections 479a and 479b—they were drafted by Mr. Tobriner.

Mr. IGOE. Lines 8 to 13—what is the effect of that?

Mr. SULLIVAN. That adds any "property or credits." That has simply been rewritten so as to put credits as well as property in there.

Mr. DANFORTH. That is a misprint.

Mr. SULLIVAN. That is a misprint in the original draft, but not in this bill.

Mr. DANFORTH. Undertaking.

Mr. SULLIVAN. Yes; "undertaking."

Mr. TOBRINER. Section 479a is new matter. Under the law, as now in existence, these various officers, like executors, administrators. and guardians, and trustees and receivers, as also parties litigant, such as creditors suing out foreign attachments, are required to give a bond, and recovery upon that bond can only be had, in case there is a right to recover, by a separate action at law. The result is that there is delay in prosecuting under it. The rights of creditors under guardians', executors', and administrators' bonds are very much interfered with, and we have provided that in every one of those instances where a bond of any character at all, by the provisions of the code, is required, the bond shall be in the form of an undertaking, under seal. without a maximum penalty, and by the provisions of that undertaking, the principal and surety shall submit themselves to the jurisdiction of the court in which the undertaking is filed, and it is the same undertaking as is provided by the act in injunctions pendente lite, or preliminary restraining orders, and the form of proceeding is also provided under that section. They shall submit themselves to the jurisdiction of the court, and agree that the court shall ascertain damages, and give judgment in the case. It provides for a very speedy and efficient mode of recovery. Then we have also provided, by the following section, 479b, that in all cases where the

recovery under an undertaking is given in support of a preliminary injunction or restraining order, the court may, in giving recovery and ascertaining the damages to which the party is entitled, estimate and include a reasonable counsel fee incurred by the party against whom the restraining order was obtained in the first instance, in obtaining a dissolution thereof. Under the Federal decisions, the courts have held that they can not take into consideration the matter of counsel fees incurred by a party in obtaining a dissolution, but it should be provided for.

Mr. CARAWAY. Why should attorneys' fees be assessed against the losing party in a case of that kind any more than in any other matter? A man thinks he has a cause of action, and the man against whom he has it is not a resident of the District of Columbia, and he sues and attaches his property.

Mr. TOBRINER. No; this is only in injunction cases, where the injunction is dissolved, and there is a reference for the purpose of ascertaining the damages.

The CHAIRMAN. 484A.

Mr. EASBY-SMITH. We have covered that.

Mr. SULLIVAN. We are up to page 37 now. That is, No. 726.

The CHAIRMAN. What do you think about the power of appeal from the action of a jury condemning land, to the Supreme Court, and a trial de novo before a judge and jury? What do you think about that?

Mr. EASBY-SMITH. I should not like to express an opinion now, without going into it, but I would be very glad to go into it with the other members of the committee. We have always felt that the condemnation laws here are very unjust, and they work very harshly.

The CHAIRMAN. A jury in a condemnation case to-day assesses the value of the land, and if either party is aggrieved, they can appeal it to a superior court, and try it before a judge and jury, and usually that is the end of it.

Mr. TOBRINER. I do not know whether you are aware of the fact, Mr. Webb, but under the act covering condemnation for the widening or opening of streets, or alleys, the act requires a jury of condemnation to assess benefits upon the adjoining property, whether those benefits actually exist or not.

Mr. EASBY-SMITH. Or whether the property is 10 miles away.

Mr. TOBRINER. Yes; whether it is 10 miles away or adjacent or adjoining the street opened, or the alley.

The CHAIRMAN. Does the law say that they shall assess the benefits, or take into consideration the benefits?

Mr. TOBRINER. No; to assess the benefits.

Mr. GARD. Suppose there are no benefits?

Mr. TOBRINER. They find them.

Mr. IGOE. Do they not charge anything up to the general community?

Mr. TOBRINER. No, sir; not a cent.

Mr. CARAWAY. If they want to establish a park out here they lay all the benefits on the abutting property, notwithstanding other people may sit in it and enjoy it?

Mr. TOBRINER. As far away as they choose to go, but they must assess it against the adjoining property.

Mr. SULLIVAN. The adjoining property owners have to be the victims, to pay for the cost of the public improvement.

Mr. EASBY-SMITH. Here is a very simple illustration of the manner in which it works: My bother-in-law had a piece of property; he had an alley in the rear of his property. They decided to widen that alley and to increase the length of it to serve other property owners in the same block. They cut 5 feet off the rear of his lot——

The CHAIRMAN (interposing). Who is "they," the commissioners?

Mr. EASBY-SMITH. Yes; the Commissioners of the District of Columbia cut 5 feet off the rear of his lot and assessed benefits to him.

Mr. CARAWAY. Because he had less property on which to pay taxes?

Mr. EASBY-SMITH. The net result was that he lost 5 feet off the rear of his lot and paid $75 for benefits, when the alley was for the use of the people in the other part of the block. That is the experience in all those cases, and sometimes in opening a street they will go as far as 2 miles away and assess benefits against property 2 miles away for the opening of a street.

Mr. TOBRINER. Simply for the purpose of equalizing the damages, so that they can return a verdict.

The CHAIRMAN. Now, No. 726.

Mr. EASBY-SMITH. If the committee please, I understand that the Comptroller of the Currency approved that. It was submitted to us. The old law provided that any company operating under this subchapter—that is, the subchapter on corporations and financial institutions—"may lease, purchase, hold, and convey real estate not exceeding $500,000, and such in addition as it may acquire in satisfaction of debts due the corporation under sales, decrees, judgments, and mortgages." We have recommend an amendment that it may "lease, purchase, hold, and convey real property in which the offices of the company are located, not to exceed in value the capital and surplus of the company," removing the arbitrary figure of $500,000 and limiting it to property occupied by the company, and putting the only limitation as to value the capital and surplus of the company.

Mr. IGOE. What kind of companies does this contemplate?

Mr. EASBY-SMITH. Trust companies; so it puts a $100,000 trust company on practically the same basis as a $5,000,000 company. There is no discrimination as to the amount. It simply limits the real estate investment to the offices in which they do their business, or that building, and to the amount of their capital and surplus.

The CHAIRMAN. If the capital and surplus of a trust company is $100,000, they can own a hundred thousand dollars' worth of real estate?

Mr. EASBY-SMITH. If they occupy it as offices. That is it. Of course, besides that, they may hold, for a limited period of not more than five years, such real estate as they have to buy in to protect themselves against their debtors.

The CHAIRMAN. Now, section 808.

Mr. EASBY-SMITH. That is very simple. We have simply made a maximum penalty, and cut out the minimum.

Mr. TOBRINER. It is the chief justice's suggestion.

Mr. GARD. Is this intended to be carnal knowledge and abuse of a female child under 16—is that intended to mean with her consent?

Mr. TOBRINER. Yes; even with her consent it is statutory rape. As the situation is now, if two 16-year-old colored children in the District have carnal intercourse, and the boy is arrested and convicted, he must be sent to the penitentiary for not less than five years. We have felt that we should eliminate that minimum so as to leave it within the discretion of the court to deal with cases of that sort; leave the maximum not more than 30 years, but strike out the minimum.

The CHAIRMAN. Whoever has carnal knowledge of a female person against her will shall be imprisoned for not more than 30 years?

Mr. TOBRINER. Yes.

Mr. GARD. You probably mean "with her consent."

Mr. EASBY-SMITH. Or carnally abuses a child under 16.

Mr. CARAWAY. In other words, she can not consent?

Mr. EASBY-SMITH. No; she can not consent.

Mr. CARAWAY. It seems to me that you have confused rape with carnal knowledge, because your first clause reads, "Whoever has carnal knowledge of a female forcibly and against her will"—of course, that is rape.

Mr. EASBY-SMITH. Yes; that is rape.

Mr. CARAWAY. Now, you make a child under 16 incapable of consenting?

Mr. EABY-SMITH. Yes.

Mr. CARAWAY. But the next provision down there is that the death penalty may be assessed by a jury. Do you think it wise that unless a jury sees fit to give the death penalty, actual rape may be punished only by imprisonment?

Mr. EASBY-SMITH. We have felt that the minimum punishment could safely be left to the discretion of the court, and that it will be more just to do that.

Mr. CARAWAY. I can see that a man might be guilty of rape of the most outrageous character, and unless the jury assessed the death penalty, the court would be without power to give him adequate punishment.

Mr. EASBY-SMITH. The minimum now is 5 years, and the maximum is 30.

The CHAIRMAN. Is this the only statutory rape that we have?

Mr. EASBY-SMITH. Yes.

The CHAIRMAN. I remember three or four years ago some man was indicated for a very brutal rape. This man simply admitted it, and the court sent him to the penitentiary for 30 years.

Mr. HOEHLING. He was hung. The court would not receive that plea. He was hung very promptly. He tried to get around that statute, but the court would not receive his plea of guilty. He was a clerk in the tax office.

Mr. EASBY-SMITH. Nearly all the members of the bench have frequently expressed their regret at having to send these small colored boys to the penitentiary for five years, and it is excessive punishment in many cases of that sort, and we felt that by eliminating this minimum and leaving it within the discretion of the court it would give the court the right to impose a suitable punishment in certain cases.

The CHAIRMAN. And probably you would be more sure of getting a conviction.

Mr. HOEHLING. As the chief justice said, he had a case some time ago where there was a young colored girl who looked like a grown woman, but who was really under 16, and he did not want to send the man to jail for five years.

The CHAIRMAN. Now, section 830a.

Mr. TOBRINER. That was to meet a case where the estate of a person who dies is taken out of the District and converted by the person so taking it out. We found there was no law to meet an actual case of this kind which occurred. We had no way of bringing the estate back or of bringing the person back. It is to cover such a case as that that section 830a is suggested.

The CHAIRMAN. That is where he takes it out of the District?

Mr. TOBRINER. Out of the jurisdiction. For instance, a person dies and the relatives come on and gobble up the bonds or securities that may be in the possession of the deceased at his home, and they carry them out of the jurisdiction, and the creditors here are left without any recourse at all. This is to cure that defect in the existing law.

The CHAIRMAN. I suppose if a conversion or secretion should take place in the District you could hardly punish him in another jurisdiction?

Mr. TOBRINER. Oh, no; if he makes way from here, he would be guilty under this, but under the present law he would not be guilty of either larceny or embezzlement.

Mr. CARAWAY. Do you construe this to mean that if a man were to die in the District and his relatives should come here from some other State and take his property away that they would be guilty?

Mr. TOBRINER. Yes; if he does that in the District, he is guilty of that offense.

Mr. IGOE. Should there not be some intent?

Mr. TOBRINER. It says "willfully."

Mr. IGOE. Yes; but he must take it away with intent to deprive the creditors or somebody else of their rights. Suppose some one comes in here in the District and picks up something belonging to a relative and goes away with it; there is nothing to prevent prosecution under this statute?

Mr. TOBRINER. The word "willfully" in mose criminal statutes is construed as "knowingly," but it would not do any harm to put in "knowingly."

Mr. IGOE. It should be "wrongfully."

Mr. EASBY-SMITH. "Fraudulently" will cover it.

Mr. CARAWAY. Under this statute, if a person comes here without any intent of doing anything wrong, and just takes the effects of his relative home with him, he would be guilty under this statute.

Mr. GARD. Willfully and fraudulently.

Mr. SULLIVAN. The property might be here, belonging in another jurisdiction. Simply because the decedent dies in Alexandria, and lived in Alexandria, a person here should not have any right to make way with it.

The CHAIRMAN. Suppose a deceased should leave under a will a gold watch to a young man who lives in New York, and he should

come down here and pick up that watch and carry it back with him, would he be guilty under this section?

Mr. HOEHLING. That would not be making way with it. You might put in there "with wrongful intent."

The CHAIRMAN. I suggest that you put in there "willfully and fraudulently."

Mr. GARD. "Whoever willfully and unlawfully "——

Mr. EASBY-SMITH. "Fraudulently" makes it a little stronger.

The CHAIRMAN. I think a man should have some evil intent before he should be declared a criminal.

Mr. SULLIVAN. That is all we want. Now, section 983a deals with divorce proceedings and annulment proceedings. At the present time there is no time that elapses after a decree for divorce before its effectiveness, and a person may get a decree of divorce which is erroneous, and, pending the appeal of the other side to the court of appeals, he can marry again, and the marriage is legal because the divorce existed at the time he was married.

Mr. CARAWAY. Does the appeal suspend the divorce granted?

Mr. SULLIVAN. Only when it is perfected, and it may be 20 days before you can perfect it.

Mr. GARD. Are there any appeals from divorce decrees in this District?

Mr. SULLIVAN. Oh, yes. This simply adopts the practice of New York, and provides for an interlocutory decree, and then that 90 days shall elapse before the decree of divorce, and that the decree of divorce shall not become effective until the expiration of the time allowed for perfecting the appeal.

Mr. CARAWAY. What is the time allowed for perfecting the appeal?

Mr. SULLIVAN. Twenty days.

The CHAIRMAN. How many grounds have you here?

Mr. SULLIVAN. Only adultery.

The CHAIRMAN. On the part of either party?

Mr. SULLIVAN. Yes; on the part of either party.

Mr. GARD. Is it intended to change that in any way, or to create additional grounds for divorce?

Mr. SULLIVAN. No.

The CHAIRMAN. I had brought to my attention a pitiful case of a young girl, Miss Schneider, and there was a deliberate plan and scheme on the part of the husband to kill his wife's father and all of the family for the purpose of getting their money, and he did undertake to kill Mr. Schneider, over here in the District, and he came near doing it, and he has been convicted and sent to the penitentiary for five years. Now, here is that girl tied up with that man and she can not get away from him, just as if a dead body were hanging on to her—a man who attempted to assassinate her own father. What do you gentlemen think about that?

Mr. TOBRINER. The danger is that he will come back and try to assert his rights as her husband.

The CHAIRMAN. Yes.

Mr. HOEHLING. The difficulty was that when sometime ago it was proposed to enlarge the grounds of divorce—which I think would be quite agreeable to the bar—it was very much opposed by the ministers of the city.

Mr. IGOE. Why do you not make some provision for the protection of property rights, anyhow?

The CHAIRMAN. I think something should be done to cover such a case as the poor girl I just referred to, and I do not think any preacher should oppose it.

Mr. TOBRINER. We had various causes which we thought were reasonable when we rewrote the Code, but it was opposed by the clergy, and we only succeeded in getting it through by striking out everything except adultery.

Mr. EASBY-SMITH. We have the right of divorce from bed and board, and the right of the court to fix property rights for desertion and cruelty and intoxication, but not an absolute divorce.

Mr. IGOE. A decree under that statute would protect the wife's property rights?

Mr. EASBY-SMITH. Absolutely. She could protect herself against that.

The CHAIRMAN. How is that?

Mr. EASBY-SMITH. I say, as to property rights, she can obtain a limited divorce from the bed and board, and a decree of the court protecting her property rights, for whatever her husband may have done—cruelty, desertion, drunkenness. A wife can get a limited divorce and a decree protecting her property.

The CHAIRMAN. Proceed, gentlemen, with section 1064.

Mr. HOEHLING. That section, as we have it to-day, is the same section they have in the Federal procedure—that death seals the lips of the living with respect to any transaction that occurred between the two, but we had, in the last sentence of that section, provided that the court might call the living witness to the transaction and take his statement. Now, our trial court has found that it is very much better not to have that power lodged in the court, and this particular elimination is at the suggestion of Judge McCoy. He says it has been very embarrassing to him.

Mr. TOBRINER. It is very embarrassing to trial lawyers, because you go into court expecting that the lips of the living party are sealed, and then you find that the court is permitted to take his statement.

Mr. EASBY-SMITH. All the judges ask that that be eliminated.

Mr. HOEHLING. Yes; and Judge McCoy especially brought it to our attention.

Judge COVINGTON. The next is a mere matter of evidence.

Mr. HOEHLING. Yes; the next is a mere matter of evidence, proving a municipal ordinance.

The CHAIRMAN. 1073.

Mr. HOEHLING. That is the one I just spoke of.

The CHAIRMAN. 1073b.

Mr. HOEHLING. That is to save us the trouble of sending a witness over from the municipal building with books and records to prove a mere ordinance.

Now, 1160 we eliminate entirely. We have provided for that in other sections.

Mr. EASBY-SMITH. That is one that gives the husband all of the wife's personal property. We put him now on the same footing with the wife.

Mr. HOEHLING. 1173, on the next page, carries out the same idea of putting a wife and husband on an equality. We had a provision in the code as to renunciation by the wife, and we make that same provision for the husband.

Mr. SULLIVAN. She can take her legal share.

Mr. HOEHLING. Now, 1180, which is on page 42, is to correct what is evidently a mistake that crept into the code, as we now have it, or as a misprint. The code provides that the legal rate of interest in the District of Columbia shall be 6 per cent, provided that in written contracts the legal rate of interest may be 6 per cent. It was 10 per cent as drawn, but it passed Congress reading "six per cent."

Mr. TOBRINER. It always was from 6 to 10 per cent.

Mr. HOEHLING. We think it was probably a misprint.

The CHAIRMAN. I did not quite catch what you said about that.

Mr. HOEHLING. In the code as we now have it, it provides that the legal rate of interest in the District of Columbia shall be 6 per cent, provided that you may contract in writing for 6 per cent. In other words, it had been drawn to read in the latter case "ten per cent."

Mr. IGOE. The law is now 6 per cent?

Mr. HOEHLING. Yes; either oral or in writing. We want to make it 6 per cent orally and 10 per cent in writing.

Mr. SULLIVAN. 1179 says that it shall not exceed 10 per cent in writing, and 1180 makes that usury.

Mr. IGOE. I would be opposed to 10 per cent.

Mr. GARD. I think 10 per cent is too high.

Mr. IGOE. Eight per cent would be enough, I think.

Mr. GARD. Six per cent for ordinary interest and 8 per cent under agreement.

The CHAIRMAN. Are the banks governed by sections 1179 and 1180?

Judge COVINGTON. I do not think they are governed by either; they are glad to get 5 per cent.

Mr. GARD. It seems to me that 10 per cent is too high.

Mr. CARAWAY. If a man borrows a thousand dollars and pays 6 per cent for it, do not the banks require him to deposit a certain amount and to keep it on deposit?

Mr. EASBY-SMITH. Many of the banks do.

Mr. TOBRINER. There was a practice of requiring him to take out a certificate of deposit, and to leave it there, but the comptroller has shut down on that. That is not done now. It is not permitted, and none of them attempt to do it.

The CHAIRMAN. Would the banks be satisfied with 8 per cent instead of 10 per cent?

Mr. TOBRINER. I think they would.

Mr. HOEHLING. We are not asking this on behalf of the banks.

Mr. EASBY-SMITH. We simply put it at 10 per cent in this, because it is 10 per cent in section 1179. Let us make both 8 per cent.

Mr. SULLIVAN. Yes; make them both 8 per cent, in sections 1179 and 1180.

Mr. NELSON. 1179 is not here.

Mr. HOEHLING. No; we did not print that.

The CHAIRMAN. We will take up 1233, now, gentlemen.

Judge COVINGTON. That is a mere formal change.

Mr. HOEHLING. Yes; one or more sureties.

The CHAIRMAN. Striking out "by the justice of the peace." You do not have them any more?

Mr. HOEHLING. No. No. 1262 is a liveryman's complaint.

Mr. SULLIVAN. It is made to include garage keepers. The only addition to that is a proviso that garage keepers shall be put in the same situation as liverymen. It only relates to charges for storage, repairs, and supplies of and concerning the vehicle itself.

The CHAIRMAN. That is the only change in that section.

Mr. SULLIVAN. Yes.

The CHAIRMAN. It gives a garage man a lien on the property?

Mr. SULLIVAN. Yes. Now, section 1422 has just one change in it, at the top of page 45, the words "in the District" are stricken out. The original protest of a notary public—line 1—shall be prima facie evidence of the facts stated in the certificate. Now, the Code as originally drawn, had the words "in the District," and by reason of that, it has been contended in several proceedings here that a certificate of a notary public outside of the District would not be prima facie evidence of anything, and, of course, that is very embarrassing and conflicting with other statutes.

The CHAIRMAN. Section 1535a.

Mr. SULLIVAN. That permits a judgment in law and at equity for an amount admitted to be due. Under our rules, if a man sues for $500, and the defendant admits that he owes a thousand——

Mr. HOEHLING (interposing). If the plaintiff took it he would have to give up the balance.

The CHAIRMAN. Can he not make a tender of judgment?

Mr. EASBY-SMITH. If you go in now and accept what he admits is due, you are barred from asserting the balance of your claim.

Mr. GARD. Is there any provision about the payment of costs? Suppose he admits a certain sum due, does that follow as in an ordinary case?

Mr. TOBRINER. No.

Mr. HOEHLING. These three sections transfer from law to equity or vice versa.

Mr. IGOE. Do you think those two are necessary?

Mr. HOEHLING. I am not so sure that they are.

Mr. IGOE. In view of the authority given in the first part of the bill?

Mr. HOEHLING. We felt that perhaps it would be safer to put two sections of that kind in the amendment. It follows exactly the lines of the recent Federal act of the same kind.

The CHAIRMAN. Yes; we passed that here.

Mr. HOEHLING. No suit at law founded upon a lost instrument shall be dismissed on the ground that the suit should have been brought in equity, but a similar bond or undertaking to that required in equity shall be given as a condition precedent to judgment.

The CHAIRMAN. Have we passed 1535b and 1535c?

Mr. HOEHLING. Yes; those two go together; equitable defenses at law and the transfer from law to equity.

Mr. IGOE. I just want your opinion as to the effect of the general power given the court. I thought it would govern just such things as this. Do you think it is not broad enough?

Mr. HOEHLING. I think it is broad enough, but at the same time if there should be any question——

Mr. IGOE (interposing). Those are just the things I would like to give them authority to provide for.

The CHAIRMAN. Brother Igoe, we had that at the American Bar Association.

Mr. IGOE. I am in favor of it, understand; but I am trying to give them a general power to take care of it.

The CHAIRMAN. No; they would not do it, and we had to pass a special statute. It is remarkable to me that the thing has not been attended to long, long ago; so, to make it sure, we thought we should pass the statute.

Now, No. 1535d.

Mr. HOEHLING. The only thing there is that a suit on a lost instrument may be brought at law and not dismissed on the ground that it should have been brought in equity. It is providing for something that we should have had in our law before.

Mr. SULLIVAN. On a lost promissory note in equity you can sue to-day and give a bond. If you sue in equity and the defendant is a nonresident to-day you can not attach; if he was absent from the District you can not attach, because you could only attach at law, but by reason of this a person would have full remedy at law.

Mr. HOEHLING. The concluding section is merely as to the time it shall go into effect.

The CHAIRMAN. Gentlemen, I have here a letter signed by Mr. Charles W. Clagett, chairman of the subcommittee to consider and report on H. R. 14974, to amend the code. This letter asks for a hearing, and I suppose the committee will have to give this gentleman a hearing, and if you desire to be heard further after they are heard, we will hear you. Mr. Johnson, do you desire to be heard?

Mr. JOHNSON. It is too late to be fully heard, but I would like to submit a formal amendment. The amendment has not been considered by the members of this committee, but I feel sure that they will not be opposed to it. It would amend this bill, the official print of bill H. R. 14974, on page 5, after line 4, and in that comparative print, it would come in on page 6, after line 2. This is the proposed new matter, to be inserted immediately after section 69—two new sections, as follows. Now, section 69 of the code reads this way:

SEC. 69. Circuit court: All common law civil causes shall be tried and determined in the circuit court, except as herein provided.

The amendments proposed are as follows:

SEC. 69a. That no judge, in the trial of a civil cause before a jury, shall charge a jury in respect to matters of fact, but shall declare the law.

SEC. 69b. That any order which modifies or sets aside the verdict or finding of a jury may be made the subject of judicial review in the same way and by like process as a final order in the cause, this section being intended to authorize a review of the exercise of discretion by the trial judge whenever such discretion is exercised upon a matter which it was the province of the jury to consider and determine.

Now, the proposed amendment is to insert those two new sections following section 69 of the code, and in this bill it would come, as I say, on this official print, on page 5, after line 4; and upon the comparative print it would come in after line 2, on page 6, by inserting immediately after section 69 the two new sections which I have read.

Now, without comment, I would not think it would at this late hour be proper to undertake to elaborate upon it, but if the committee intends to spend further time on this bill, it seems to me that a committee from the chamber of commerce might be heard. I may be present at that hearing, and if opportunity and time permit, I would like to make some remarks about that, if the committee please. I think this is self-explanatory. I think our judges yield too often to the temptation that is put up to them in the trial of negligent cases, certainly by directing verdicts. At the conclusion of fully one-half of the negligence cases, there is a motion made for the direction of a verdict at the close of the plaintiff's case, and often the motion is granted. The court often yields when there is contradictory and inconsistent evidence—matter that a jury should certainly be allowed to pass on.

Mr. CARAWAY. Can you not appeal in the District of Columbia from a directed verdict?

Mr. JOHNSON. Oh, yes; you can appeal from a directed verdict.

Mr. CARAWAY. Under the present practice?

Mr. JOHNSON. Yes; but I could explain how the appeal largely fails to give you a remedy—the expense and difficulty of taking the appeal.

The CHAIRMAN. Do you mean to tell the committee that where you bring a suit for negligence against a corporation, and you have proven negligence, that the court can direct a verdict giving the plaintiff nothing, and that you can not appeal from that?

Mr. JOHNSON. No, sir; I did not say that at all. If it is unquestioned that negligence has been proved, the court would not undertake to direct a verdict; but what I do say is that the court too often undertakes to perform the function of the jury, and because the individual judge holding the court, if he were a juryman, would have decided that the case was not made out, he will direct the verdict accordingly.

The CHAIRMAN. Would it not be better to have the court pass upon the question of whether or not there was evidence sufficient to go to the jury, and if they found there was some evidence in the court of appeals, they would overrule the court below?

Mr. JOHNSON. That is the rule; yes, sir. It has not been three days since, I think, a trial judge is reported to have refused to direct a verdict in a case of negligence, under the employer's liability act, against one of the railway companies. The court of appeals reversed the judgment and said the motion to direct a verdict should have been granted. The jury had returned a substantial verdict for the plaintiff.

Mr. IGOE. You would not want to take away from the court the power to say that there was not sufficient evidence to go to the jury?

Mr. JOHNSON. Oh, no; of course not.

The CHAIRMAN. The committee will stand adjourned, but before we adjourn I want to thank Chief Justice Covington and the members of the bar association for their assistance.

Mr. HOEHLING. On behalf of the committee, I want to thank your committee for the very attentive and courteous hearing that you have accorded us.

(Whereupon, at 5.10 o'clock p. m., the committee adjourned.)

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